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IN THE

Supreme Court of the United States

BECTON DICKINSON AND COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA, DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

For purposes of satisfaction of a restitution award, can the limitations period for "wrongful levy" actions, set forth at I.R.C. § 6532(c), be equitably tolled to allow a crime victim to pursue recovery of the perpetrator's assets which the Internal Revenue Service seized to satisfy a tax obligation which arose solely as a result of the criminal activity where, by virtue of the perpetrator's due process rights, the victim could not assert its restitution interest in the perpetrator's assets until after the relevant limitations period had expired?

PARTIES TO THE PROCEEDING

The only parties remaining are Becton Dickinson and Company ("Petitioner") and the United States of America, Department of the Treasury, Internal Revenue Service ("the IRS").

CORPORATE DISCLOSURE STATEMENT

Petitioner, Becton Dickinson and Company, has no parent company and no publicly held company owns 10% or more of its stock.

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The opinion of the Court of Appeals (App. A) is reported at 215 F.3d 340 (3d Cir. 2000). The opinion of the District Court (App. B) is reported at 24 F. Supp. 2d 375 (D.N.J. 1999).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on June 6, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the court of first instance relative to Petitioner's claim against the IRS was based upon 28 U.S.C. § 1331.

By application pursuant to Rule 13 of the Rules of the Supreme Court of the United States, Justice Souter extended Petitioner's time to file this Petition to October 6, 2000.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

26 U.S.C. § 7426, entitled "Civil actions by persons other than taxpayers", provides, in relevant part:

> (a) Actions permitted. —
>
> (1) Wrongful levy. — If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary.
>
> * * *
>
> (b) Adjudication. — The district court shall have jurisdiction to grant only such of the following forms of relief as may be appropriate in the circumstances:

* * *

(2) Recovery of property. — If the court determines that such property has been wrongfully levied upon, the court may —

* * *

(B) grant a judgment for the amount of money levied upon. . . .

26 U.S.C. § 6532(c) provides:

(c) Suits by persons other than taxpayers. —

(1) General Rule. — Except as provided by paragraph (2), no suit or proceeding under section 7426 shall be begun after the expiration of 9 months form the date of the levy or agreement giving rise to such action.

(2) Period when claim is filed. — If a request is made for the return of property described in section 6343(b), the 9-month period prescribed in paragraph (1) shall be extended for a period of 12 months from the date of filing of such request or for a period of 6 months from the date of mailing by registered or certified mail by the Secretary to the person making such request of a notice of disallowance of the part of the request to which the action relates, whichever is shorter.

26 C.F.R. § 301.6343-2(a)(1) and (a)(2) provide:

(a) *Return of property* — (1) *General rule.* If the district director, service center director, or compliance center director (the *director*) determines that property has been wrongfully levied upon, the director may return —

(i) The specific property levied upon;

(ii) An amount of money equal to the amount of money levied upon; or

(iii) An amount of money equal to the amount of money received by the United States from a sale of the property.

(2) *Time of return.* If the United States is in possession of specific property, the property may be returned at any time. An amount equal to the amount of money levied upon or received from a sale of the property may be returned at any time before the expiration of 9 months from the date of the levy. When a request described in paragraph (b) of this section is filed for the return of property before the expiration of 9 months from the date of levy, an amount of money may be returned after a reasonable period of time subsequent to the expiration of the 9-month period if necessary for the investigation and processing of such request.

STATEMENT OF THE CASE

Vindication of a crime victim's statutory restitution rights must await the perpetrator's conviction and sentencing. Since the perpetrator must be afforded due process, substantial time often will pass from the commission of the crime until the issuance of a restitution award. In contrast, the Internal Revenue Code allows the IRS to move quickly to collect a tax obligation arising from the "income" the perpetrator generates by his criminal activity. If the perpetrator lacks sufficient assets to satisfy the restitution award ultimately issued, as here, swift action by the IRS, if immune from subsequent challenge by the victim, will forever deprive the victim of the ability to be made whole.

Unless the perpetrator's assets are directly traceable to the crime, the victim will not have a choate interest therein until the issuance of the restitution award. In light of Congress's clear intent and the strong public policy that crime victims be made whole, and considering other relevant legal principles, Petitioner argued below that (a) a crime victim's interest in a perpetrator's assets arising from an award of restitution must be superior to any interest of the IRS therein where the tax obligation arises solely from the subject criminal activity and (b) this interest must relate back to the commission of the crime (neither of the lower courts reached these issues, and they are not the subject of this Petition).

Petitioner's ultimate contention is that, based upon the foregoing, the IRS's seizure of a perpetrator's assets under circumstances such as those presented here constitutes a "wrongful levy" under I.R.C. § 7426. The limitations period for such a claim, set forth at § 6532(c), is nine months from the date of the Notice of Levy. If the IRS moves quickly, this period will have long expired by the time the perpetrator is sentenced and a restitution award issued. When the victim ultimately seeks to assert its superior interest in the perpetrator's assets, the IRS can hide behind the expiration of the short limitations period, unjustly preventing the victim from recovering a portion of its loss. Consequently, § 6532(c) must be equitably tolled to account for the fact that the crime victim could not pursue recovery of the seized assets until it obtained a choate interest therein by virtue of a restitution award.

Without equitable tolling of § 6532(c), the government profits from the crime at the victim's expense, a result everyone (except, apparently, the IRS) would agree is intolerable and certainly not intended by Congress.

A. Relevant Factual Background

During 1988-94, Reinhard Wolckenhauer ("Wolckenhauer"), a longtime employee of Petitioner's Ivers-Lee Division, and several

others engaged in a scheme through which they defrauded Petitioner out of several million dollars. After receiving an anonymous tip, Petitioner approached federal authorities.

In November of 1994, after an investigation conducted by the IRS and the Federal Bureau of Investigation, Wolckenhauer was arrested and charged with various federal crimes in connection with this scheme. On March 22, 1996, approximately sixteen months after his arrest, Wolckenhauer pled guilty to defrauding Petitioner out of at least $1.5 million. At his sentencing on September 24, 1996, nearly two years after his arrest, Wolckenhauer was ordered to pay restitution to Petitioner in the sum of $2,201,241. After an appeal, by Order entered July 17, 1998, the sentencing court reduced this award to $407,188.44, based upon Wolckenhauer's inability to pay a larger sum.

On or about April 19, 1995, almost a full year before Wolckenhauer's guilty plea and nearly a year and a half before his initial sentencing, the IRS assessed unpaid income taxes against Wolckenhauer in the sum of $865,240.06. The fact that this tax assessment arose *solely* from Wolckenhauer's failure to report the "income" arising from his criminal activity is not disputed. In other words, had Wolckenhauer not committed these crimes and caused Petitioner to sustain a multi-million dollar loss, this tax obligation would not have arisen.

At the time of this assessment, Petitioner was holding the proceeds of a pension, in the sum of $323,948.44, which Wolckenhauer had amassed through his many years in Petitioner's employ. On or about April 21, 1995, the IRS served a Notice of Levy upon Petitioner for the turnover of the pension proceeds, to partially satisfy the aforementioned tax obligation. As it was required to do by law, and since it did not, at that time, have a choate interest in the pension proceeds, Petitioner complied with the Notice of Levy and paid the pension proceeds to the IRS.

There is no dispute that, by virtue of its participation in the investigation, the IRS knew (or should have known) that Wolckenhauer's financial condition was such that the pension proceeds would be needed to satisfy a future restitution obligation. In fact, the IRS had issued a jeopardy assessment against him pursuant to I.R.C. § 6861(a) because it feared that its assessment would become uncollectible. *Wolckenhauer v. United States*, No. CIV. 95-2798, 1996 WL 303146 (D.N.J. Mar. 26, 1996).

There also is no dispute that Wolckenhauer's restitution obligation cannot be satisfied without the pension proceeds. By the time restitution was first awarded to Petitioner, almost eighteen months had passed from the time the IRS seized the pension proceeds and applied them to the tax obligation. As soon as Petitioner obtained a choate interest in the pension proceeds (by virtue of the issuance of a restitution award in its favor), it impleaded the IRS into this litigation (which already was pending against the various participants in the scheme) and asserted its claim to the pension proceeds. The statute of limitations for the commencement of a "wrongful levy" action, however, already had expired.[1]

The extremely inequitable outcome of these circumstances is that the government has profited from Wolckenhauer's

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1. Contrary to the District Court's conclusion, Petitioner could not, in good faith, have filed a demand with the IRS for the return of the pension proceeds (pursuant to I.R.C. § 6532(c)(2)), because it did not obtain a choate interest in the pension proceeds until after more than nine months from the date of the Notice of Levy. In the absence of the restitution award which, under 18 U.S.C. § 3613, can be enforced in the same manner as the IRS can enforce tax liens, Petitioner did not have a basis to assert an enforceable interest in Wolckenhauer's pension. *See* 26 C.F.R. § 301.6343-2(b)(3) (requiring a request under § 6532(c)(2) to include a "description of the claimant's basis for claiming an interest in the property levied upon"); 26 C.F.R. § 301.6343-2(c) (request which does not contain the information listed in subsection (b) is considered "inadequate").

criminal activity at the expense of the victim, in that it has collected a tax obligation which otherwise would not have arisen, while Petitioner, the victim of the crime, has been left without the ability to recover a meaningful portion of its loss.

B. The Proceedings Below.

After impleading the IRS into this litigation, Petitioner moved for summary judgment on its "wrongful levy" claim against the IRS, and the IRS cross-moved for summary judgment dismissing the claim. By decision and order dated October 28, 1998, the District Court denied Petitioner's motion for summary judgment and granted the IRS's cross-motion. *Becton Dickinson v. Wolckenhauer* 24 F. Supp. 2d 375 (D.N.J. 1998), *aff'd*, 215 F.3d 340 (3d Cir. 2000). The trial court held that, *inter alia*, while the limitations period set forth at 26 U.S.C. § 6532(c) could be equitably tolled, Petitioner had not demonstrated that the facts supported the application of equitable tolling here. *Id.* at 380-81.

Petitioner timely appealed to the Third Circuit. By Opinion filed June 6, 2000, the Third Circuit affirmed the denial of Petitioner's motion and the granting of the IRS's cross-motion with an opinion that can best be described as a mirror image of that of the District Court. *Becton Dickinson v. Wolckenhauer*, 215 F.3d 340 (3d Cir. 2000). The Third Circuit held that the limitations period set forth at I.R.C. § 6532(c) could not be equitably tolled as a matter of law because it is "jurisdictional". *Id.* at 349. The decision noted, however, that two of the three judges on the panel "believe that a strong argument could be made" for equitable tolling under the circumstances of this case if equitable tolling had been available. *Id.* at 341 n.2.

REASONS FOR GRANTING THE WRIT

The Third Circuit's opinion creates a split in the Circuits as to whether § 6532(c) can be equitably tolled, is not consistent with this Court's decisions on equitable tolling and disregards Congress's clear intent both that equitable tolling be available to § 6532(c) and that crime victims be made whole.

The Third Circuit's decision creates a split in the circuits which, if not addressed, will jeopardize a crime victim's statutory right to restitution. The decision also is inconsistent with decisions of this Court relevant to equitable tolling. For these reasons, the Petition should be granted. *See* Rule 10 of the Rules of the Supreme Court of the United States.

The Third Circuit's decision directly conflicts with the decisions of the United States Court of Appeals for the Ninth Circuit in *Capital Tracing, Inc. v. United States*, 63 F.3d 859 (9th Cir. 1995), and *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204 (9th Cir. 1995), each of which held that § 6532(c) can be equitably tolled. The District Courts that have addressed equitable tolling of § 6532(c) also are split. In addition to the District Court's decision here, *Gothenburg State Bank & Trust Co. v. United States*, No. 7:98CV5026, 1999 WL 314928, at *3 (D. Neb. 1999), holds that § 6532(c) can be equitably tolled. On the other hand, in *Compagnoni v. United States*, No. 94-0813-CIV-MARCUS, 1997 WL 416482 (S.D. Fla. 1997), *aff'd*, 173 F.3d 1369 (11th Cir. 1999), the district court indicated that § 6532(c) was not subject to equitable tolling.[2]

The Third Circuit's decision also is not consistent with the principles of equitable tolling espoused in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), *United States v.*

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2. The district court's determination of the equitable tolling question in *Compagnoni* was not presented on appeal to the Eleventh Circuit. *See Compagnoni v. United States*, 173 F.3d 1369, 1371 n.5 (11th Cir. 1999).

Brockamp, 519 U.S. 347 (1997), and *United States v. Beggerly*, 524 U.S. 38 (1998).

I.

Congress did not intend for the Government to profit from crime at the expense of the victim.

The Third Circuit's determination of the question presented here jeopardizes a fundamental principle of both criminal law and public policy — that crime victims should be made whole. Congress has frequently expressed its intention that this goal be fulfilled, most recently in 1996 in enacting the Mandatory Victims Restitution Act ("MVRA"). *See* Antiterrorism and Effective Death Penalty Act of 1996, 18 U.S.C. §§ 3663, 3663A, 3664 (2000). The MVRA significantly strengthened a victim's right to restitution by making full restitution mandatory for crimes such as those committed by Wolckenhauer.[3]

The House report discussing the MVRA states:

> There has been significant progress over the last 15 years in addressing the needs of crime victims. Their voices are no longer missing from the national debate concerning criminal justice. In spite of this progress, however, additional reforms are needed. Under existing law, crime victims' rights are still too often overlooked. Even though the law provides the means to address the rights of victims, the law does not, however, provide for a means to make victims whole.
>
> H.R. 665, the "Victim Restitution Act of 1995," is an important step forward in ensuring justice for

3. The MVRA amendments apply to convictions obtained after April 24, 1996. *See* 18 U.S.C. § 3663A. Under the law in effect at the time of Wolckenhauer's conviction, the amount of restitution depended upon the ability of the perpetrator to pay. 18 U.S.C. § 3663(a)(1)(B) (1995).

> victims of crime and accountability for convicted criminals. By requiring full financial restitution, the Act requires the offender to face the harm suffered by his victims and, [sic] to others harmed by his unlawful actions. Further, it strives to provide those who suffer the consequences of crime with some means of recouping the personal and financial losses resulting from crime.

H.R. Rep. No. 104-16 (1995), *reprinted at* 1995 WL 43586, at *13.

The Senate report similarly states:

> The purpose of [the MVRA] is to improve the administration of justice in Federal criminal cases by requiring Federal criminal defendants to pay full restitution to the identifiable victims of crimes.
>
> * * *
>
> This legislation is needed to ensure that the loss to crime victims is recognized, and that they receive the restitution that they are due. It is also necessary to ensure that the offender realizes the damage caused by the offense and pays the debt owed to the victim as well as to society.
>
> * * *
>
> It is essential that the criminal justice system recognize the impact that crime has on the victim, and, to the extent possible, ensure that offender [sic] be held accountable to repay these costs. This is the essence of the committee's intent in favorably reporting the bill H.R. 665, the Victims Justice Act of 1995 [which became the MVRA].

S. Rep. No. 104-179 (1995), *reprinted in* 1996 U.S.C.C.A.N. 924 (1996), 1995 WL 731704, at *41, *54.

These statements are not new. The same goals were stated when Congress enacted the Victim and Witness Protection Action ("VWPA") (in 1982) to "insure that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well-being." S. Rep. No. 97-532 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2515, 1982 WL 25068, at *50. As Representative Rodino then noted, the VWPA was designed to implement Congress's intent "that Federal crime victims receive the fullest possible restitution from criminal wrongdoers." 128 Cong. Rec. 27391 (1982) (statement of Rep. Rodino).

Congress's intention that the restitution rights of crime victims take precedence over any financial obligation the perpetrator may owe to the government is also reflected in the relevant statutes. *See* 18 U.S.C. § 3612 (funds collected by the government pursuant to a sentence are to be distributed in the following order: (1) to satisfy a "special assessment" to finance the Crime Victim's Fund, (2) for restitution of victims, and (3) to satisfy all other fines, penalties, etc.); 18 U.S.C § 3572(b) (entitled "Fine not to impair ability to make restitution"); 28 C.F.R. § 545.11 (monies earned by an inmate while incarcerated are applied in the following order: (1) special assessments, (2) court-ordered restitution, (3) fines and court costs, (4) state or local court obligations, and (5) other federal government obligations).

The government has repeatedly acknowledged the primary importance placed upon ensuring that crime victims are made whole in cases before this Court and the lower courts. *See, e.g., Hughey v. United States*, 495 U.S. 411, 420 (1990) (noting the government's reliance upon the VWPA's express purpose "to ensure that the Federal Government does all that is possible within limits of available resources to assist victims . . . without infringing on the constitutional rights of the defendant"); *United States v. Friedman*, 143 F.3d 18, 23 (1st Cir. 1998) (government argues that Congress's intent is that

a crime victim's restitution claim should take priority over the claims of most other creditors).

Here, Wolckenhauer's restitution obligation cannot be satisfied without the pension proceeds. The IRS has used its expedited enforcement powers and the short limitations period of § 6532(c) to collect a tax on the proceeds of the criminal activity, which tax never would have arisen if not for the criminal activity (and the victim's loss), thereby frustrating the victim's restitution rights. Congress did not intend that the IRS prevent restitution and profit from the crime at the expense of the victim. Nevertheless, the IRS has chosen to hide behind the limitations period set forth in § 6532(c) to defeat Petitioner's claim. Equitable tolling of § 6532(c) is needed to give effect to Congress's intent that crime victims be made whole, particularly before the federal government profits from the crime.

II.

The Third Circuit's reliance upon the "jurisdictional" nature of § 6532(c) as the basis for denying equitable tolling was misplaced. The key consideration is Congress's intent, which the Third Circuit failed to properly consider.

In addition to the need for the Court to address the grave risk to a crime victim's statutory right to restitution which arises from the IRS's indefensible position, the Court's review is warranted because the Third Circuit completely misapplied the principles of equitable tolling this Court has espoused.

In determining that § 6532(c) cannot be equitably tolled, the Third Circuit relied primarily upon its determination that § 6532(c)'s limitations period is "jurisdictional". The Third Circuit concluded that, because a "wrongful levy" claim under § 7426 can be brought *only* against the federal government, equitable tolling of § 6532(c) would be an unreasonable extension of Congress's waiver of sovereign immunity. *Wolckenhauer*, 215 F.3d at 349-50.

Brockamp and *Beggerly* demonstrate that the Third Circuit's reliance upon this consideration is misplaced. The determinative factor is Congress's intent — which supports equitable tolling of § 6532(c) to prevent the IRS from frustrating a crime victim's right to restitution. *See* Points III and IV, *infra.*

Irwin is the seminal case concerning equitable tolling of claims against the federal government. In *Irwin*, the Court held:

> Once Congress has made such a waiver [of sovereign immunity], we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver. Such a principle is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation. We therefore hold that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States. Congress, of course, may provide otherwise if it wishes to do so.

Irwin, 498 U.S. at 95-96.

The lower courts have disagreed as to the application of the *Irwin* doctrine. The Ninth Circuit interprets *Irwin* to hold that, absent specific congressional intent, equitable tolling will be available to a claim against the federal government irrespective of whether that particular claim can be brought against a private defendant. *See Cedars-Sinai Med. Ctr. v. Shalala*, 125 F.3d 765, 770 (9th Cir. 1997). The Third Circuit, and others, have interpreted *Irwin* much more narrowly, to hold that equitable tolling is not available to any claim which can be brought only against the government, as the limitations periods for all such claims must be "jurisdictional". *See Wolckenhauer*, 215 F.3d at 349; *RHI Holdings v. United States*, 142 F.3d 1459,

1462-63 (Fed. Cir. 1998); *see also Webb v. United States*, 66 F.3d 691, 697 (4th Cir. 1995), *cert. denied*, 519 U.S. 1148 (1997) (where equitable tolling applies in case against private litigant, it can apply to comparable claim against the government). In other words, these courts view the "suits against private defendants" language as being intended to specifically restrict the application of equitable tolling to solely those claims which can be brought against both the government and a private citizen.

Brockamp and, subsequently, *Beggerly* demonstrate that whether a limitations period is "jurisdictional" or merely "procedural" is not relevant to the application of equitable tolling. *Brockamp* concerned whether the limitations period set forth in I.R.C. § 6511, for filing an administrative claim with the federal government for a tax refund, could be equitably tolled. In concluding that § 6511 is not subject to equitable tolling, the Court considered the vital question to be: "Is there good reason to believe that Congress did not want the equitable tolling doctrine to apply?" *Brockamp*, 519 U.S. at 350. Since Congress had not expressly stated its intent relative to equitable tolling of § 6511, the Court considered three factors to be determinative. First, the Court considered the intricate language of § 6511:

> Section 6511 sets forth its time limitations in unusually emphatic form. Ordinary limitations statutes use fairly simple language, which one can often plausibly read as containing an implied "equitable tolling" exception. [citation omitted] But § 6511 uses language that is not simple. It sets forth its limitations in a highly detailed technical manner, that, linguistically speaking, cannot easily be read as containing implicit exceptions. Moreover, § 6511 reiterates its limitations several times in several different ways. . . .

Brockamp, 519 U.S. at 350-51, 117 S. Ct. at 851.

Second, the Court considered the statutory scheme relative to tax refunds and the extent to which it contained exceptions to § 6511's limitations. The Court noted that:

> (1) the statutory scheme explicitly specifies that refunds which do not comply with § 6511's limitations are "erroneous" and sets forth a mechanism for the government to recover such "erroneous" refunds. *Id.* at 351-52.
>
> (2) Section 6511 itself contains substantive limitations on recovery, in addition to time limitations on filing a claim. *Id.* at 351.
>
> (3) Section 6511's more than fifty paragraphs include multiple explicit exceptions to its time limitations, none of which includes equitable tolling. *Id.* at 351.

Third, the Court considered administrative and policy concerns, noting the "serious administrative problems" which could result from permitting § 6511 to be equitably tolled. The Court specifically referenced the fact that the IRS deals annually with 200 million tax returns and disburses 90 million refunds. *Id.*

The fact that § 6511 may be a "jurisdictional" limitations period is not mentioned anywhere in the decision. The Court simply assumed, without analysis, the petitioner's contention that a tax refund claim and a common-law claim for restitution were "sufficiently similar" to invoke the *Irwin* rebuttable presumption. *Id.* at 347. If the Third Circuit's interpretation of *Irwin* was correct, which it is not, the Court would simply have rejected the petitioner's appeal on the basis of the unquestionably "jurisdictional" nature of § 6511, irrespective of any similarity between a tax refund claim and a civil restitution claim and without the need to consider any of the factors which are the foundation of its decision. *Compare Id.* at 350 *with*

Wolckenhauer, 215 F.3d at 349 (Third Circuit states that Petitioner's contention that a "wrongful levy" claim is similar to a private claim for conversion is "not without intuitive appeal" yet rejects the argument "as a matter of law because the time limitation set forth in section 6532(c) does not and would not apply to private suits at common law for the recovery of money converted").

Brockamp thus illustrates that the crucial consideration in determining whether the limitations period for a suit against the federal government can be equitably tolled is Congress's intent, not the nature of the limitations period or the nature of the specific claim. As one commentator accurately explained:

> [T]he Irwin Court affirmed the lower court's decision to dismiss the plaintiff's Title VII claim for lack of subject matter jurisdiction. *Irwin, therefore, plainly contemplates that limitations periods can be both jurisdictional and susceptible to equitable tolling.* Congress prescribes the temporal conditions under which Article III courts may exercise jurisdiction over the United States. Limitations periods that condition the United States's consent to suit are necessarily jurisdictional. But the point of Irwin is that the prescribed time period need not be strictly applied and may be equitably tolled if lengthening the time period is consistent with the congressional intent behind the statute. As long as there is no contrary legislative intent, equitable tolling does not expand Congress's waiver of immunity beyond legislatively acceptable limits.

Richard Parker and Ugo Colella, *Revisiting Equitable Tolling and the Federal Tort Claims Act: The Impact of Brockamp and Beggerly*, 29 Seton Hall L. Rev. 885, 898 (1999) (footnotes omitted) (emphasis added).

The Court reinforced the principles described above in *United States v. Beggerly*, 524 U.S. 38 (1998). In *Beggerly*, the Court took a similar approach to determining whether the limitations period for a claim which can be brought only against the federal government can be equitably tolled. *Beggerly* concerned the limitations period in the Quiet Title Act, set forth at 28 U.S.C. § 2409a. The Quiet Title Act waives sovereign immunity to permit suits against the federal government to quiet title in real property.

The Court determined that the Quiet Title Act's 12-year statute of limitations was not subject to equitable tolling after considering § 2409a's language and policy considerations favoring the quick resolution of disputes concerning ownership of real property. *Beggerly*, 524 U.S. at 48-49. Specifically, the Court found that, since § 2409a begins to run from the date a plaintiff "knew or should have known of the claim of the United States", the statute "has already effectively allowed for equitable tolling." *Beggerly*, 524 U.S. at 48. This fact, coupled with the "unusually generous nature of the QTA's limitations time period" militated against equitable tolling. *Id.* at 48-49. As in *Brockamp*, the Court never referred to the fact that the relevant limitations period is "jurisdictional". Moreover, it does not appear that the Court even considered whether the type of claim at issue in *Beggerly* could be brought against a private defendant.

Irwin, *Brockamp* and *Beggerly* demonstrate that the determinative consideration in the analysis of whether the limitations period for a particular claim against the government can be equitably tolled is Congress's intent. The mere fact that a limitations period may be "jurisdictional" does not preclude a conclusion that equitable tolling is available.

III.

Congress's expressed intent is that equitable tolling be applicable to § 6532(c).

Consideration of Congress's expressed intent reveals the error in the Third Circuit's determination that § 6532(c) cannot be equitably tolled.

The Third Circuit did not consider that, immediately after *Brockamp*, Congress amended § 6511 to allow for equitable tolling. Specifically, Congress added a new § 6511(h) which allows § 6511's limitations period to be equitably tolled under circumstances such as those presented in *Brockamp*. *See* I.R.C. § 6511(h).

As this Court stated more than thirty years ago, "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." *Red Lion Broadcasting Co. v. Federal Communications Comm'n*, 395 U.S. 367, 380-81 (1969). Congress's amendment of § 6511, a direct response to *Brockamp*, is a clear statement of Congress's intent that "equitable tolling should be considered in the application of the statutory limitations on the filing of tax refund claims." H.R. Rep. 105-364(I) (1997), *reprinted at* 1997 WL 689805, at *175; *see also* 142 Cong. Rec. H3399-06, H3412 (statement of Rep. Dunn.) (noting that this amendment is intended to remedy the "outrageous injustice" of *Brockamp*); 143 Cong. Rec. H10040-02, H10041 (statement of Rep. Archer) (stating amendment intended to avoid circumstances which arose in *Brockamp*); 143 Cong. Rec. H10001-02, H10030-31 (statement of Rep. Hayworth) (same).

This amendment demonstrates Congress's clear intent that an exception for equitable tolling was to be implied in § 6511, despite the statute's "detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions". *Brockamp*, 519 U.S. at 352.

If Congress intended for equitable tolling to be available to a statute as "detailed" and "technical" as § 6511, then certainly it intended that equitable tolling be available to remedy extreme injustice arising under a more "ordinary" statute of limitations such as § 6532(c) (as in this case), which "one can often plausibly read as containing an implied 'equitable tolling' exception." *Id.* at 350; *see* Section IV, *infra*. As one commentator stated:

> Although sections 6511 and 6532(c) are structurally different, imputing congressional intent from the newly enacted section 6511(h) to section 6532(c) is not unreasonable. Both sections govern return of funds or property improperly held by the [IRS]. In both cases, if the court does not permit equitable tolling in circumstances such as disability where the taxpayer or third-party is blameless (as compared to cases of negligence or neglect), the [IRS] would receive an unjust windfall. The potential loss of money by blameless taxpayers and third-parties can be great. In one pre-Brockamp tax refund case, the Service was a $4 million beneficiary of an attorney and physician's scheme to defraud their elderly client. In [the instant case], over $300,000 was at stake. The potential for such harsh results was exactly what Congress sought to prevent in enacting section 6511(h).

K. David Phan, *Equitable Tolling Applies to Section 6532(c) in Third-Party Wrongful Levy Actions: Becton Dickinson & Co. v. Wolckenhauer*, 52 Tax Lawyer 913, 919-20 (1999).

In addition, the facts presented demonstrate that equitable tolling of § 6532(c) is required to accomplish Congress's goal that the government do as much as possible to see that crime victims are made whole through statutory restitution. *See* Point I, *supra*. 18 U.S.C. § 3612 vests the Attorney General with primary responsibility for enforcing and collecting a

restitution award. 18 U.S.C. § 3613 provides that a restitution award enjoys the same standing as a federal tax lien against the perpetrator's property. If a perpetrator owes a tax obligation and, ultimately, restitution, the government will have a conflict of interest when it seizes a perpetrator's assets — should the assets be applied to the tax obligation (the dollars then going into the government's coffers) or should they be used for restitution purposes (and be repaid to the victim).

This conflict will always result in prejudice to the crime victim, as evidenced by the IRS's actions here. The government will proceed in furtherance of its self-interest and keep the asset, rather than do the just thing and turn it over the victim, despite the fact that Congress has made clear that a perpetrator's restitution obligation should be satisfied before his obligations to the government. *See* Point I, *supra*.

The only way for the victim, a third party, to challenge a misapplication of funds seized by the IRS is through a "wrongful levy" action under § 7426. However, as stated above, the limitations period for such an action likely will have expired by the time the restitution award is issued.[4] The only way to give effect to Congress's intent that restitution obligations be satisfied before a perpetrator's other obligations to the government is by equitably tolling § 6532(c) to allow the victim to present its challenge.

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4. The crime victim also will be unable to file, in good faith, a formal request for return of the property with the IRS and extend the limitations period, pursuant to § 6532(c)(2), since it will not have a choate interest in the asset until the restitution award is issued.

IV.

In addition to Congress's expressed intent, consideration of the *Brockamp* and *Beggerly* factors demonstrates that § 6532(c) can be equitably tolled.

In addition to Congress's clear intent that equitable tolling apply to § 6532(c), a review of the factors considered in *Brockamp* and *Beggerly*, namely, the language of § 6532(c), the statutory scheme and administrative and public policy concerns demonstrates that § 6532(c) can be equitably tolled. As the District Court correctly found: "Section 6532(c) contains none of the three elements that were determinative in *Brockamp*: 1) detailed and technical language, 2) substantive limitations on the amount of recovery, and 3) the risk of over-burdening the IRS." *Wolckenhauer*, 24 F. Supp.2d at 379. The Third Circuit's determination to the contrary is unsound.

The language of § 6532(c) cannot reasonably be construed as evidencing any intention that equitable tolling not be applicable. In *Brockamp* the Court found that the detailed and technical nature of § 6511 suggested that Congress did not intend for equitable tolling to be available. Section 6532(c) is the antithesis of § 6511 in this regard. Section 6532(c)(1) sets forth its limitations in a mere one sentence: "Except as provided by paragraph (2), no suit or proceeding under section 7426 shall be begun after the expiration of 9 months from the date of the levy or agreement giving rise to such action." Contrasting this simple limitations period with the more than fifty paragraphs of § 6511 demonstrates the dissimilarity between the two statutes.

Moreover, § 6532(c) does not set forth its limitations period in a "highly detailed technical manner, that . . . cannot easily be read as containing implicit exceptions." *Brockamp*, 519 U.S. at 350. The statute states its limitations period only once, as opposed to § 6511, which "reiterates its limitations several times in several different ways." *Id.* As the District Court accurately

stated: "This statute is simple in language and construction, like the provision at issue in *Irwin*. It merely states that suits under section 7426 'shall [not] be begun after 9 months from the date of the levy.' " *Wolckenhauer*, 24 F. Supp.2d at 379; *see also Gothenburg State Bank*, 1999 WL 314928, at *3 (noting the "simple language" of § 6532(c) in accepting the *Wolckenhauer* District Court's determination that § 6532(c) can be equitably tolled). There cannot be any reasonable dispute that § 6532(c) is an ordinary limitations statute which "use[s] fairly simple language, which one can often plausibly read as containing an implied 'equitable tolling' exception." *Brockamp*, 519 U.S. at 350.

The Third Circuit stated that the difference between 42 U.S.C. § 2000e-16(c) (the statute at issue in *Irwin*), which provides that an aggrieved employee "*may* file a civil action", and § 6532(c), which says that "No suit or proceeding . . . *shall* be begun after the expiration of 9 months . . ." distinguishes this case from *Irwin*. 42 U.S.C. § 2000e-16(c) (emphasis added); I.R.C. § 6532(c) (emphasis added). *Irwin* specifically rejected such a distinction as a basis for holding that equitable tolling is not applicable:

> The phraseology of this particular statutory time limit is probably very similar to some other statutory limitations on suits against the Government, but probably not all of them. In the present statute, Congress said that "[w]ithin thirty days . . . an employee . . . may file a civil action . . . ." In [Soriano v. United States, 352 U.S. 270, 77 S. Ct. 269], Congress provided that "[E]very claim . . . shall be barred unless the petition . . . is filed . . . within six years. . . ." An argument can undoubtedly be made that the latter language is more stringent than the former, *but we are not persuaded that the difference between them is enough to manifest a different*

> *congressional intent with respect to the availability of equitable tolling.*

Irwin, 498 U.S. at 94-95 (emphasis added).

The statutory scheme also does not indicate that the *Irwin* rebuttable presumption in favor of equitable tolling should not apply. The Tax Code does not contain any language stating that the return of wrongfully levied property after the time set forth in § 6532(c) is "erroneous", as was the case with the statutes at issue in *Brockamp*. *Brockamp*, 519 U.S. at 351; *see* I.R.C. § 6514 (refunds which do not comply with § 6511's limitations "shall be considered erroneous"). There is nothing in the statutory scheme indicating that wrongfully-levied money or property cannot be returned after the passage of the limitations period or any other particular amount of time. To the contrary, the applicable regulations allow for the return of wrongfully-levied money or property after an indefinite "reasonable period of time subsequent to the expiration of the 9-month period [in which wrongfully levied money is to be returned] if necessary for the investigation and processing of [a request for the return of such money or property under § 6532(c)(2)]." 26 C.F.R. § 301.6343-2(a)(2). Section 6532(c) also does not contain any substantive limitations on the recovery of wrongfully-levied property or money, as opposed to § 6511. *See, e.g.*, I.R.C. § 6511(b)(2).

Section 6532(c) does not contain the numerous detailed, specific exceptions to the limitations period which are present in § 6511. Section 6532(c) contains a single exception — a claimant can extend its time to bring a wrongful levy suit by filing a written request for return of the subject property. I.R.C. § 6532(c)(2). This exception is not nearly so detailed as to rule out the possible application of equitable tolling in extraordinary circumstances. Perhaps more importantly, the extension contemplated by § 6532(c)(2) does not depend in any respect upon the circumstances of the claim, so equitable considerations are not incorporated therein. *Cf. Beggerly*, 524

U.S. at 48 (limitations period under Quiet Title Act incorporated equitable considerations where it ran from the date plaintiff "knew or should have known" of the claim of the United States). As the District Court determined, "[a]lthough [§ 6532(c)(2)] permits a one-year extension upon request, section 6532(c), overall, does not contain the linguistic and substantive complexity that compelled the Supreme Court to preclude equitable tolling under § 6511." *Wolckenhauer*, 24 F. Supp. 2d at 380.

Finally, the administrative and policy concerns implicated by equitable tolling of § 6511 are not presented by tolling of § 6532(c). In *Brockamp*, the Court noted that the IRS "processes more than 200 million tax returns each year [and] issues more than 90 million refunds." *Brockamp*, 519 U.S. at 352. The Court concluded that "[t]o read an 'equitable tolling' exception into § 6511 could create serious administrative problems by forcing the IRS to respond to, and perhaps litigate, large numbers of late claims, accompanied by requests for 'equitable tolling' which, upon close inspection, might turn out to lack sufficient equitable justification." *Id.*

Equitable tolling of § 6532(c) would not place anywhere near the same burden upon the IRS that tolling of § 6511 might. The IRS issued a mere 3,109 notices of levy in 1996 and 3,659 such notices in 1997, the most recent years for which such information appears to be publicly available. *See* U.S. Dep't of Treasury, IRS 1997 Data Book, Pub. No. 55B, Table 20: Delinquent Collection Activity (1997). These numbers are dwarfed by the mammoth magnitude of tax refunds and returns discussed in *Brockamp*. The Third Circuit's conclusion that equitable tolling of § 6532(c) could result in "serious administrative problems" is unsupported.

Since *Brockamp*, the lower courts have been finding equitable tolling applicable to similar "ordinary" statutes of limitations, in both tax and non-tax cases. *See Perez v. United States*, 167 F.3d 913 (5th Cir. 1999) (limitations period under Federal Tort Claims Act); *Clymore v. United States*, 217 F.3d

370, *withdrawn and superseded in part on other grounds*, __ F.3d __, 2000 WL 1206012 (5th Cir. 2000) (limitations period at 18 U.S.C. § 2401(a)); *United States v. Marsh*, 89 F. Supp. 2d 1171 (D. Haw. 2000) (limitations period under I.R.C. § 7433(d)(3), concerning claims against the government for damages arising from the reckless, intentional or negligent disregard of the Tax Code in the collection of a tax); *N.C. Alliance for Transp. Reform, Inc. v. United States Dep't of Transp.*, 104 F. Supp.2d 599 (M.D.N.C. 2000) (limitations contained in 28 U.S.C. § 2412(d)(1)(B) for the assertion of a claim to recover attorneys' fees from the United States under the Equal Access to Justice Act).

In sum, *none* of the factors which caused the *Brockamp* Court to conclude that § 6511 cannot be equitably tolled are present here. Section 6532(c) is an ordinary statute of limitations. It does not contain multiple detailed, specific exceptions to its limitations, and its one stated exception does not have any relevance to equitable considerations. The administrative headaches which tolling of § 6511 could present will not arise if § 6532(c) is equitably tolled. Finally, and perhaps most importantly, Congress confirmed its clear intent that equitable tolling be available to § 6532(c), § 6511, and other limitations periods in the Tax Code by amending § 6511 after *Brockamp* to allow for equitable tolling. The only reasonable conclusion is that the Third Circuit erred in determining that § 6532(c) cannot be equitably tolled.

CONCLUSION

The Third Circuit's determination that § 6532(c) cannot be equitably tolled is erroneous and creates a split in the circuits which this Court should resolve. Accordingly, Petitioner respectfully requests that the Petition be granted and that a writ of certiorari issue.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED JUNE 6, 2000

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-6015

BECTON DICKINSON AND COMPANY,

Appellant

v.

REINHARD A. WOLCKENHAUER, a/k/a REINHARD WOLKENHAUER; WALTER WOLCKENHAUER; ROYAL MACHINE AND TOOL COMPANY; WILLIAM HOSIE; ANN HOSIE, d/b/a HANOVER PATTERN; UNITED STATES OF AMERICA, DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 95-cv-01084)
District Judge: Honorable Nicholas H. Politan

Argued March 2, 2000

Before: ROTH, BARRY and STAPLETON, *Circuit Judges*

(Opinion filed: June 6, 2000)

* * *

Appendix A

OPINION OF THE COURT

ROTH, *Circuit Judge*:

The appellant in this case, Becton Dickinson & Company ("BDC"), brought suit against the Internal Revenue Service (the "IRS") pursuant to 26 U.S.C. § 7426(a)(1), seeking the return of $323,948.44, the value of Reinhard Wolckenhauer's pension and retirement benefits held by BDC and seized by the IRS to satisfy Wolckenhauer's tax liability. BDC contends that this money should be paid not to the IRS, but rather to BDC as restitution for the fraud perpetrated on the company by Wolckenhauer.

Although BDC's suit to recover this money was filed after the expiration of the nine-month time limitation period, set forth in section 6532(c) of the Internal Revenue Code, BDC argues that the time limitation in section 6532(c) can and should be equitably tolled.[1] BDC contends for that reason that the restitution order handed down by the District Court in Wolckenhauer's criminal trial grants them an interest in the $323,948.44 seized by the IRS to satisfy Wolckenhauer's tax liability. Finally, assuming that it possesses an interest in this money, BDC argues that its restitution interest in Wolckenhauer's pension and retirement benefits is superior to the IRS's tax liability interest.

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1. There are two distinct questions: *Can* the time limitation in section 6532(c) be equitably tolled and, if so, do the facts of this case give rise to a situation in which the time limitation in section 6532(c) *should* be equitably tolled?

Appendix A

The IRS and BDC each filed motions for summary judgment. The District Court, after concluding that the time limitation set forth in 26 U.S.C. § 6532(c) could be equitably tolled, held that the facts of the case did not give rise to a situation in which the time limitation should be equitably tolled, denied BDC's motion for summary judgment, and granted the IRS's motion for summary judgment. Because we conclude that the time limitation in section 6532(c) is a jurisdictional bar that cannot be equitably tolled, regardless of the equities in a given case, we will remand the case to the District Court with instructions to dismiss the case for lack of subject matter jurisdiction.[2]

I. FACTS

The relevant facts in this case are undisputed by the parties. While employed at Ivers-Lee,[3] Reinhard Wolckenhauer[4]

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2. Because we conclude that section 6532(c) cannot be equitably tolled, we need not reach the question of whether the time limitation in section 6532(c) should be equitably tolled or whether BDC's restitution interest in Wolckenhauer's pension and retirement benefits is superior to the IRS's tax liability interest. Were we, however, to reach that question, Judges Roth and Barry believe that a strong argument could be made that in the unique circumstances of this case, *i.e.*, where Wolckenhauer's tax liability arose solely as the result of the fraud he perpetrated on BDC and where the government levied on his pension and retirement benefits held by BDC, thus depriving BDC — the victim — of restitution, BDC's restitution interest is superior to the government's tax liability interest.

3. Ivers-Lee is a division of Becton Dickinson & Company.

4. Wolckenhauer is an appellee in name only. This appeal arises entirely out of a dispute between the IRS and BDC.

defrauded Ivers-Lee by means of an elaborate scheme involving fraudulent purchasing invoices. On February 28, 1995, Wolkenhauer was indicted for conspiracy (one count), mail fraud (fifteen counts) and the filing of false income tax returns (four counts). On April 21, 1995, the IRS, which had been investigating Wolckenhauer's criminal activities, issued a notice of levy to the Ivers-Lee division of BDC indicating that Wolckenhauer owed $865,240.06 in unpaid federal income taxes for the tax years 1988, 1989, 1990 and 1991.[5] The notice of levy directed BDC to relinquish to the IRS all money that BDC then owed Wolckenhauer. Pursuant to this notice of levy, on May 2, 1995, BDC remitted to the IRS $323,948.44, the value of Wolckenhauer's pension and retirement benefits.

On March 22, 1996, Wolckenhauer pleaded guilty to conspiracy, mail fraud and the filing of false income tax returns. The government and Wolckenhauer stipulated in the plea agreement that the financial loss to BDC as a result of Wolckenhauer's fraudulent scheme was no less than $1.5 million, but no more than $2.5 million. On September 24, 1996, the District Court in Wolckenhauer's criminal case entered an order requiring Wolckenhauer to make restitution to BDC in the amount of $2.2 million. On November 7, 1996, BDC, which had already brought suit against Wolckenhauer and other individuals in connection with Wolckenhauer's fraudulent scheme, filed an amended complaint in the District Court asserting a cause of action against the IRS for the alleged wrongful levy on Wolckenhauer's pension and retirement benefits. Suing under 26 U.S.C. § 7426(a)(1),

5. The tax liability that Wolckenhauer incurred arose entirely from income "earned" by means of this fraudulent scheme.

BDC contended that "[the September 24, 1996,] order of restitution issued in favor of Becton Dickinson has priority over and is superior to the [government's] federal tax liens." App. at A74.

On May 29, 1997, the Court of Appeals for the Third Circuit vacated the September 24, 1996, restitution order and remanded the case to the District Court for additional fact-finding concerning Wolckenhauer's assets and the needs of his dependent family members. On March 12, 1998, the District Court in Wolckenhauer's criminal case amended the restitution order and directed Wolckenhauer to pay $83,200 in restitution to BDC.

Finally, on July 15, 1998, at the request of BDC and Wolckenhauer, the District Court in Wolckenhauer's criminal case modified the March 12, 1998, restitution order, taking into account the possibility that BDC might prevail in this litigation against the IRS. The amended restitution order requires Wolckenhauer to make restitution to BDC in the amount of $407,148.44, to be reduced to $83,200 in the event that BDC does not obtain a favorable judgment in this case.[6]

BDC brings this wrongful levy action pursuant to 26 U.S.C. § 7426(a)(1), seeking to recover the value of

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6. Were BDC to prevail in this litigation, it would be entitled to the $323,948.44 seized by the IRS pursuant to the April 21, 1995, notice of levy. $407,148.44 is the sum of the amount seized by the IRS pursuant to its notice of levy ($323,948.44) and the amount of restitution required under the March 12, 1998, restitution order ($83,200).

Wolckenhauer's pension and retirement benefits from the IRS to satisfy the aforementioned restitution order.[7] On March 3 and 5, 1997, respectively, the IRS and BDC each filed motions for summary judgment. On October 28, 1998, the District Court denied BDC's motion for summary judgment and granted the IRS's motion for summary judgment, holding that: (1) BDC's wrongful levy claim against the IRS was barred by the time limitation set forth in 26 U.S.C. § 6532(c);[8] (2) even if BDC's claim were not time-barred, BDC possessed no interest in Wolckenhauer's retirement and pension benefits; and (3) even if BDC possessed an interest in Wolckenhauer's retirement and pension benefits, its interest was junior to the IRS's interest. BDC appeals the District Court's grant of summary judgment.

II. JURISDICTION & STANDARD OF REVIEW

Jurisdiction in this case is at issue. However, the District Court did have jurisdiction, pursuant to 28 U.S.C. § 1331, to determine if it had subject matter jurisdiction over BDC's claim. *See* 28 U.S.C. § 1331 (1999) ("The district courts shall have original jurisdiction of all civil actions arising under

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7. The claims asserted by BDC against parties other than the IRS were dismissed by consent orders entered on January 12 and April 22, 1998.

8. While the District Court concluded that the time limitation in section 6532(c) could be equitably tolled, the District Court also concluded that the facts of this case did not give rise to a situation in which the time limitation should be equitably tolled. *See supra* note 1.

the Constitution, laws, or treaties of the United States."). We have jurisdiction, pursuant to 28 U.S.C. § 1291, to determine whether the District Court properly exercised subject matter jurisdiction over BDC's claim. *See* 28 U.S.C. § 1291 (1999) ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ."). Although the parties did not address the issue of jurisdiction per se, as we have held previously, "it is axiomatic that this [C]ourt has a special obligation to satisfy itself of its own jurisdiction, as well as the jurisdiction of the court under review." *United States v. Touby*, 909 F.2d 759, 763 (3d Cir. 1990) (internal quotation marks omitted) (citations omitted).

Our review of the District Court's grant of summary judgment is plenary. *See, e.g., Hurley v. Atlantic City Police Dept.*, 174 F.3d 95, 128 n.29 (3d Cir. 1999).

> [We] review the district court's summary judgment determination de novo, applying the same standard as the district court. . . . [I]n all cases[,] summary judgment should be granted if, after drawing all reasonable inferences from the underlying facts in the light most favorable to the non- moving party, the court concludes that there is no genuine issue of material fact to be resolved at trial[,] and [that] the moving party is entitled to judgment as a matter of law.

Kornegay v. Cottingham, 120 F.3d 392, 395 (3d Cir. 1997) (quoting *Spain v. Gallegos*, 26 F.3d 439, 446 (3d Cir. 1994)). In determining whether the District Court erred, we must

view the facts as asserted by the nonmoving party as true, if they are supported by affidavits or other evidentiary material. *See Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1080 (3d Cir. 1996). We also must draw all reasonable inferences in favor of the nonmoving party. *See id.* at 1081. A nonmoving party has created a genuine issue of material fact if it has provided sufficient evidence to allow a jury to find in its favor at trial. *See Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 330 (3d Cir. 1995).

III. DISCUSSION

A. Relevant Statutory Language

Section 7426(a)(1) provides third parties with a civil cause of action to recover from the IRS property "wrongfully levied." 26 U.S.C. § 7426(a)(1) (1999); *see, e.g., Internal Revenue Service v. Gaster*, 42 F.3d 787, 789 (3d Cir. 1994). Section 6532(c) of the Internal Revenue Code, which sets forth the relevant time limitation for wrongful levy actions brought pursuant to section 7426(a)(1), states:

> c) Suits by persons other than taxpayers. —
>
> (1) General rule. — Except as provided by paragraph (2), no suit or proceeding under section 7426 shall be begun after the expiration of 9 months from the date of the levy or agreement giving rise to such action.
>
> (2) Period when claim is filed. — If a request is made for the return of

> property [wrongfully levied upon], the 9-month period prescribed in paragraph (1) shall be extended for a period of 12 months from the date of filing of such request or for a period of 6 months from the date of mailing by registered or certified mail by the Secretary to the person making such request of a notice of disallowance of the part of the request to which the action relates, whichever is shorter.

26 U.S.C. § 6532(c) (1999). Thus, as the statute clearly indicates, "no suit or proceeding under section 7426 shall be begun after the expiration of 9 months from the date of the levy." 26 U.S.C. § 6532(c)(1) (1999).

While it is undisputed that BDC's claim was filed after the nine-month time limitation set forth in 26 U.S.C. § 6532(c)(1) had expired, BDC argues that the time limitation should be equitably tolled.[9] Specifically, BDC argues that because the order requiring Wolckenhauer to pay restitution to BDC was not handed down until after the nine-month time limitation in section 6532(c) had expired, it did not acquire an interest in Wolckenhauer's pension and retirement benefits until after the time limitation in section 6532(c) had expired. Therefore, BDC argues, because it could not have brought suit against the IRS until it acquired an interest in

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9. The IRS issued the notice of levy on April 21, 1995; BDC brought suit under section 7426(a)(1) against the IRS on November 7, 1996, over eighteen months later.

Wolckenhauer's pension and retirement benefits, which occurred after the time limitation in section 6532(c) had expired, this time limitation should be equitably tolled now to allow BDC to bring suit pursuant to section 7426(a)(1).

B. Principles for Determining the Appropriateness of Equitable Tolling

Before determining whether the time limitation in section 6532(c) should be equitably tolled, we must first determine whether the time limitation in section 6532(c) can be equitably tolled. As we have held on numerous occasions:

> Time limitations analogous to a statute of limitations are subject to equitable modifications such as tolling, *see Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1387 (3d Cir. 1994), which "stops the running of the statute of limitations in light of established equitable considerations," *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1125 (3d Cir. 1997). On the other hand, when a time limitation is considered jurisdictional, it cannot be modified and non-compliance is an absolute bar. *See Oshiver*, 38 F.3d at 1387.

Miller v. New Jersey State Dep't of Corrections, 145 F.3d 616, 617-18 (3d Cir. 1998); *see also Seitzinger v. Reading Hosp. and Med. Ctr.*, 165 F.3d 236, 239-40 (3d Cir. 1999) (holding that Title VII's 90-day time limitation is akin to a statute of limitations and thus is subject to equitable tolling); *New Castle County v. Halliburton NUS Corp.*,

111 F.3d 1116, 1126 n.12 (3d Cir. 1997) ("Where the filing requirements are considered 'jurisdictional,' non-compliance bars an action regardless of the equities in a given case." (quoting *Hart v. J. T. Baker Chem. Co.*, 598 F.2d 829, 832 (3d Cir. 1979))) (internal quotation marks omitted); *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1387 (3d Cir. 1994) (same); *Shendock v. Director, Office of Workers' Compensation Programs*, 893 F.2d 1458, 1462-64 (3d Cir. 1990) (en banc) ("When Congress intends the sixty days it specified as the time to seek review of an adverse Board decision in a court of appeals to be a mandatory condition upon the availability of the judicial remedy of review, the statutory provisions relating to the time and place of filing are termed 'jurisdictional.' "). To determine whether the time limitation in section 6532(c) is a statute of limitations, which can be equitably tolled, or a jurisdictional bar, which cannot be tolled, regardless of the equities in a given case, "we look to congressional intent by considering the language of the statute, legislative history, and statutory purpose." *Miller*, 145 F.3d at 618; *see Shendock*, 893 F.2d at 1462-64.

In making this determination, Supreme Court jurisprudence provides significant guidance. As the Supreme Court has stated, "[t]ime requirements in lawsuits between private litigants are customarily subject to 'equitable tolling.' " *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990) (citing *Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1989)); *see also, e.g., United States v. Midgley*, 142 F.3d 174, 179 (3d Cir. 1998) ("[E]quitable tolling may be appropriate if (1) the defendant has actively misled the plaintiff, (2) if the plaintiff has 'in some

extraordinary way' been prevented from asserting his rights, or (3) if the plaintiff has timely asserted his rights mistakenly in the wrong forum." (quoting *Kocian v. Getty Ref. & Mktg. Co.*, 707 F.2d 748, 753 (3d Cir. 1983))) (internal quotation marks omitted). This case, however, is not a "lawsuit between private litigants;" BDC is suing the government, not a private litigant. Because the time limitation in section 6532(c) is applicable exclusively to suits brought under section 7426, and because section 7426 creates only a cause of action against the United States, and not against private litigants, it is inappropriate to assume that the time limitation in section 6532(c) is necessarily like other time limitations that are "customarily subject to 'equitable tolling.' "

Moreover, because BDC is suing the United States, and not a private litigant, sovereign immunity is implicated. It is black letter law that "the United States cannot be sued . . . without the consent of Congress." *Block v. North Dakota*, 461 U.S. 273, 287 (1983). Section 7426 clearly constitutes a waiver of sovereign immunity. Thus, as the Supreme Court has stated on myriad occasions:

> [W]hen Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied. When waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity. Accordingly, although we should not construe such a time-bar provision unduly restrictively, we must be careful not to interpret

> it in a manner that would "extend the waiver beyond that which Congress intended."

Id.; *see also Lane v. Pena*, 518 U.S. 187, 192 (1996) ("[A] waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign."); *United States v. Williams*, 514 U.S. 527, 531 (1995) (holding that when confronted with a purported waiver of the federal government's sovereign immunity, the Court will "construe ambiguities in favor of immunity"); *United States v. Mottaz*, 476 U.S. 834, 841 (1986) ("When the United States consents to be sued, the terms of its waiver of sovereign immunity define the extent of the court's jurisdiction.") (citing *United States v. Sherwood*, 312 U.S. 584, 586 (1941)); *Bowen v. City of New York*, 476 U.S. 467, 479 (1986) (holding that the "the 60-day limitation" for bringing suit against the government to contest the denial or termination of social security benefits is "a condition on the waiver of sovereign immunity, and thus must be strictly construed"); *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981) ("[L]imitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied."). Thus, in determining whether the time limitation in section 6532(c) is a statute of limitations, which can be equitably tolled, or a jurisdictional bar, which cannot, we are mindful of the fact that section 7426(a)(1), the statutory provision pursuant to which BDC brings suit against the government, is a waiver of sovereign immunity. Moreover, section 6532(c), which sets forth the time limitation applicable to a wrongful levy action brought against the government pursuant to section 7426, is a condition on the waiver of sovereign immunity expressed in

section 7426(a)(1) and must be strictly observed; exceptions are not to be lightly implied.

1. *Irwin v. Department of Veterans Affairs*

Against the backdrop of these general principles, the Supreme Court has on two occasions since 1990 considered when a time limitation applicable to a lawsuit brought against the government can be equitably tolled. The Supreme Court, like the Third Circuit, in determining when such time limitations can be equitably tolled, has focused exclusively on congressional intent. *See United States v. Brockamp*, 519 U.S. 347, 353 (1997) ("[C]ongressional efforts . . . seem but a smaller part of a larger congressional objective: providing the Government with strong statutory 'protection against stale demands.' ") (citations omitted); *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990); *Miller*, 145 F.3d at 618 ("in determining whether a specific time limitation should be viewed as a statute of limitations or a jurisdictional bar, we look to congressional intent by considering the language of the statute, legislative history, and statutory purpose.").

First, in 1990, the Supreme Court considered whether the time limitation set forth in 42 U.S.C. § 2000e-16(c), a provision of Title VII, could be equitably tolled. *See Irwin*, 498 U.S. at 91.[10] Before reaching the merits of the case, the

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10. Section 2000e-16(c) stated in relevant part:

> Within thirty days of receipt of notice of final action taken by . . . the Equal Employment Opportunity

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Court acknowledged the inconsistency of past Supreme Court opinions that addressed when time limitations applicable to lawsuits against the government could be equitably tolled.[11] Characterizing its opinion as an attempt to develop a coherent framework for determining when equitably tolling is appropriate, the Court in *Irwin* stated:

> Thus, a continuing effort on our part to decide each case on an ad hoc basis, as we appear to have done in the past, would have the disadvantage of continuing unpredictability without the corresponding advantage of greater fidelity to the intent of Congress. We think that this case affords us an opportunity to adopt a more general rule to govern the applicability of equitable tolling in suits against the Government.

Id. at 95. Addressing the specific time limitation at issue, the *Irwin* Court acknowledged that "section 2000e-16(c) is a condition to the waiver of sovereign immunity and thus must be strictly construed." *Id.* at 93 (citing *Library of*

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> Commission . . . and employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title.

42 U.S.C. § 2000e-16(c) (1986).

11. *See, e.g.*, *Bowen v. City of New York*, 476 U.S. 467, 479 (1986); *Soriano v. United States*, 352 U.S. 270, 275-76 (1957).

Congress v. Shaw, 478 U.S. 310 (1986)). However, the Court concluded that

> [o]nce Congress has made such a waiver, . . . making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little if any broadening of the congressional waiver [and therefore] the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States.

Id. at 95. As this language demonstrates, the *Irwin* Court concluded that because private defendants could be sued under 42 U.S.C. § 2000e-5, and because the applicable time limitation could be equitably tolled in lawsuits between private litigants, Congress must have intended for the time limitation to be equitably tolled (when appropriate) in lawsuits brought against the government. *See id.*[12]

2. *United States v. Brockamp*

Subsequent to its holding in Irwin, the Supreme Court again addressed the issue of when a time limitation applicable to a lawsuit against the government can be equitably tolled. *See United States v. Brockamp*, 519 U.S. 347 (1997).

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12. Although the *Irwin* Court held that the time limitation set forth in section 2000e-16(c) *could* be equitably tolled, the Court eventually concluded that the facts of the case before it did not give rise to a situation where the statute of limitations *should* be tolled. *See Irwin*, 498 U.S. at 96; *supra* note 1.

The Court in *Brockamp*, considering whether the time limitation set forth in 26 U.S.C. § 6511[13] could be equitably tolled, was quick to point out that Irwin was not controlling. *See id.* at 349-50. While the *Irwin* Court held that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States," the *Brockamp* Court noted that because section 6511 does not create a cause of action against private defendants, the "rebuttable presumption" created by the Court in *Irwin* arguably did not apply to the time limitation set forth in section 6511. *Id.* Nonetheless, the *Brockamp*

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13. Section 6511 is quite complex and states in part that a "[c]laim for . . . refund . . . of any tax . . . shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed . . . within 2 years from the time the tax was paid." 26 U.S.C. § 6511(a) (1986). The statute also states that "[n]o credit or refund shall be allowed or made after the expiration of the period of limitation prescribed . . . unless a claim for . . . refund is filed . . . within such period." 26 U.S.C. § 6511(b)(1). This point is reiterated:

> If the claim was filed by the taxpayer during the 3-year period . . . the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return.

26 U.S.C. § 6511(b)(2)(A). Finally, the statute states that "[i]f the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim." 26 U.S.C. § 6511(b)(2)(B).

Court assumed, but only for the sake of argument, "that a tax refund suit and a private suit for restitution are sufficiently similar to warrant asking Irwin's negatively phrased question: Is there good reason to believe that Congress did not want the equitable tolling doctrine to apply?" *Id.* at 350.

Thus, applying *Irwin*'s rebuttable presumption and addressing the specific time limitation in section 6511, the *Brockamp* Court first noted that:

> Section 6511 sets forth its time limitations in unusually emphatic form. Ordinarily limitations statutes use fairly simple language, which one can often plausibly read as containing an implied "equitable tolling" exception. *See, e.g.*, 42 U.S.C. § 2000e-16(c) (requiring suit for employment discrimination to be filed "[w]ithin 90 days of receipt of notice of final [EEOC] action"). But § 6511 uses language that is not simple. It sets forth its limitations in a highly detailed technical manner, that linguistically speaking, cannot easily be read as containing implicit exceptions.

Id. The Court also noted that:

> Section 6511 sets forth explicit exceptions to its basic time limits, and those very specific exceptions do not include "equitable tolling." *See* [26 U.S.C.] § 6511(d) (establishing special time limit rules for refunds related to operating losses, credit carrybacks, foreign taxes, self-employment taxes, worthless securities, and bad debts).

Id. at 351-52. The *Brockamp* Court ultimately held that Congress did not intend to permit equitable tolling with respect to section 6511:

> To read an "equitable tolling" provision into these provisions, one would have to assume an implied exception for tolling virtually every time a number appears. To do so would work a kind of linguistic havoc. Moreover, such an interpretation would require tolling, not only procedural limitations, but also substantive limitations on the amount of recovery — a kind of tolling for which we have found no direct precedent. Section 6511's detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions, taken together indicate to us that Congress did not intend courts to read other unmentioned, open ended, "equitable" exceptions into the statute that it wrote. There are no counter-indications.

Id. at 352. Reinforcing this conclusion, the Court explained that "[t]ax law, after all, is not normally characterized by case specific exceptions reflecting individualized equities." *Id.* The *Brockamp* Court further pointed out that:

> The nature of the underlying subject matter — tax collection — underscores the linguistic point. The IRS processes more than 200 million tax returns each year. It issues more than 90 million refunds. *See* Dept. of Treasury, Internal Revenue Service, 1995 Data Book 8-9. To read an "equitable

> tolling" exception into § 6511 could create serious administrative problems by forcing the IRS to respond to, and perhaps litigate, large numbers of late claims, accompanied by requests for "equitable tolling" which, upon close inspection, might turn out to lack sufficient equitable justification.

Id. at 352-53. Thus, a unanimous Court in *Brockamp* held that the time limitation in section 6511 could not be tolled, regardless of the equities in a given case.

C. Equitable Tolling and Section 6532(c)

Turning to the case at hand, and the time limitation in section 6532(c), BDC argues that this time limitation is analogous to the time limitation at issue in *Irwin* and thus can be equitably tolled, while the IRS argues that this time limitation is analogous to the time limitation at issue in *Brockamp* and thus cannot be equitably tolled. While we acknowledge that the time limitation at issue in this case falls somewhere between the time limitation considered in Irwin and the time limitation considered in *Brockamp*, we conclude that section 6532(c) is a jurisdictional bar, analogous in almost all relevant respects to the time limitation at issue in *Brockamp*, and therefore that the time limitation in section 6532(c) cannot be equitably tolled. There are several reasons for our conclusion.

1. Suits Brought Only Against the Government

First, like the time limitation at issue in *Brockamp*, but unlike the time limitation at issue in *Irwin*, the time limitation

in section 6532(c) applies *only to suits brought against the government and not suits brought against private defendants*. Indeed, section 7426(a)(1), which section 6532(c) modifies, authorizes only suits against the government. Thus, *Irwin*'s "rebuttable presumption" does not apply; "making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits" has no meaning in the context of a statute that creates only a cause of action against the government.

BDC tries to counter this point by arguing that a suit at common law for recovery of money converted is analogous to a suit brought pursuant to section 7426(a)(1). Therefore, BDC argues, making the rule of equitable tolling applicable to suits against the government brought under section 7426(a)(1), in the same way that it is applicable to private suits at common law for the recovery of money converted, amounts to little if any broadening of the congressional waiver, and thus the same rebuttable presumption of equitable tolling applicable to suits against private defendants at common law for the recovery of money converted should also apply to suits against the United States brought under section 7426. While this argument is not without intuitive appeal, it fails as matter of law because the time limitation set forth in section 6532(c) does not and would not apply to private suits at common law for the recovery of money converted.[14] Our analysis is reinforced by the Supreme

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14. There exists no federal statute, nor as a matter of federal constitutional law could there exist a federal statute, creating a private cause of action for the recovery of money converted by a private individual or entity. *Cf. United States v. Lopez*, 514 U.S.

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Court's skepticism in *Brockamp* that "a tax refund suit" brought under 26 U.S.C. § 7422 and "a private suit for restitution" are "sufficiently similar" to warrant the application of *Irwin*'s "rebuttable presumption." *Brockamp*, 519 U.S. at 350 (citing sources for the proposition that "a tax refund suit" brought under 26 U.S.C. § 7422 and "a private suit for restitution" are not analogous); *see also, e.g.*, *Flora v. United States*, 362 U.S. 145, 153-154 (1960) (citing *Curtis's Administratrix v. Fiedler*, 2 Black 461, 479 (1863)) (distinguishing common-law suit against the tax collector from action of assumpsit for money had and received); *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 382-383 (1933); William T. Plumb, Jr., *Tax Refund Suits Against Collectors of Internal Revenue*, 60 HARV. L. REV. 685, 687 (1947) (describing collector suit as a fiction solely designed to bring the Government into court). In comparing the time limitation at issue in *Irwin* with the time limitation at issue in this case, it is clear that were we to apply the rule of equitable tolling to suits against the government brought under section 7426(a)(1), it would amount to a substantial broadening of the congressional waiver. Therefore, the reasoning of the *Irwin* Court is entirely unpersuasive with respect to section 6532(c). The provision at bar is similar to the tax provision considered in *Brockamp* and distinguishable from the Title VII limitation considered in *Irwin*, reinforcing the conclusion that section 6532(c) cannot be equitably tolled.

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549, 567-68 (1995) (holding that prohibiting by means of federal criminal law the possession of guns in and around local schools is an unconstitutional extension of Congress's powers under the Commerce Clause).

2. The Structure of Section 6532(c)

Second, like the time limitation at issue in *Brockamp*, but unlike the one at issue in *Irwin*, section 6532(c) "sets forth its time limitation[ ] in unusually emphatic form." *Brockamp*, 519 U.S. at 350. While the time limitation at issue in Irwin was permissive in nature, the time limitation at issue in *Brockamp* and the time limitation at issue in this case are not. *Compare* 42 U.S.C. § 2000e-16(c) (1990) ("[A]n employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, *may* file a civil action as provided in [42 U.S.C. §] 2000e-5.") (emphasis added) *with* 26 U.S.C. § 6511(b)(1) (1996) ("*No credit or refund shall be allowed or made* after the expiration of the period of limitation prescribed . . . unless a claim for . . . refund is filed . . . within such period.") (emphasis added), *and* 26 U.S.C. § 6532(c)(1) (1996) ("*No suit or proceeding . . . shall be begun* after the expiration of 9 months from the date of the levy or agreement giving rise to such action.") (emphasis added). Thus the emphatic, non-permissive nature of the language in section 6532(c) also suggests that the time limitation at issue cannot be equitably tolled.

Moreover, like the time limitation at issue in *Brockamp*, but unlike the time limitation at issue in *Irwin*, section 6532(c) "sets forth explicit exceptions to its basic time limit[ ], and those very specific exceptions do not include equitable tolling." *Brockamp*, 519 U.S. at 351. Section 6511(d) establishes special time limit rules for refunds related to operating losses, credit carrybacks, foreign taxes, self-employment taxes, worthless securities, and bad debts.

See 26 U.S.C. § 6511(d) (1996). Similarly, section 6532(c)(2) states that

> [i]f a request is made for the return of property described in section 6343(b), the 9-month period prescribed in [section 6532(c)(1)] shall be extended for a period of 12 months from the date of filing of such request or for a period of 6 months from the date of mailing by registered or certified mail by the Secretary to the person making such request of a notice of disallowance of the part of the request to which the action relates, whichever is shorter.

26 U.S.C. § 6532(c)(2) (1996). The existence of an explicit exception in section 6532(c)(2) to the generally applicable nine-month time limitation in section 6532(c)(1) further suggests that the nine-month time limitation in section 6532(c)(1) cannot be equitably tolled. Moreover, both the time limitation at issue in *Brockamp* and the time limitation at issue in this case are provisions of the Internal Revenue Code set forth at Title 26, Subtitle F, Chapter 66, entitled "Limitations." *See* 26 U.S.C. §§ 6511, 6532(c) (1996); *see also Brockamp*, 519 U.S. at 352 ("Tax law, after all, is not normally characterized by case-specific exceptions reflecting individualized equities.").

3. The Underlying Subject Matter

Finally, like the time limitation at issue in *Brockamp*, "[t]he nature of the underlying subject matter — tax collection — underscores the linguistic point." *Brockamp*,

519 U.S. at 352. In light of the "more than 200 million tax returns" and "90 million refunds" that the IRS processes annually, the *Brockamp* Court was clearly concerned about the administrative burden the IRS would face if the Court permitted section 6511 to be equitably tolled. *Id.* While wrongful levy claims undoubtedly compose a much smaller subset of taxpayer suits brought against the IRS than do claims for "credit or refund of an overpayment of any tax imposed by" the IRS,[15] equitably tolling the time limitation in section 6532(c) could nevertheless pose serious administrative problems because *anyone*, not just the taxpayer in question, can bring a wrongful levy suit against the IRS. 26 U.S.C. § 6511(a) (1996); *see Brockamp*, 519 U.S. at 352 ("The nature and potential magnitude of the administrative problem suggest that Congress decided to pay the price of occasional unfairness in individual cases (penalizing a taxpayer whose claim is unavoidably delayed) in order to maintain a more workable tax enforcement system."). *Compare* 26 U.S.C. § 7422 (creating a cause of action for *taxpayers* seeking a refund from the IRS) (emphasis added), *with* 26 U.S.C. § 7426 ("If a levy has been made on property or property has been sold pursuant to a levy, *any person* (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States.") (emphasis added).

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15. The time limitation at issue in *Brockamp*, set forth in section 6511, applies to claims for "credit or refund of an overpayment of any tax imposed by" the IRS. 26 U.S.C. § 6511(a) (1996).

Holding that section 6532(c) can be equitably tolled could open the floodgates to countless suits brought under section 7426 against the government by various third-party creditors laying claim to assets seized by the IRS many years after the expiration of the time limitation set forth in section 6532(c). *Cf. Brockamp*, 519 U.S. at 352. Thus, the potential for administrative problems alluded to by the *Brockamp* Court is arguably at least as, if not more acute in our case than in *Brockamp* because equitable tolling could lead to myriad, stale wrongful levy claims by various third parties. *Cf. id.* at 352-53.

In addition to potential administrative problems associated with countless wrongful levy suits brought against the IRS, we are mindful of the IRS's need for certainty and finality when imposing a levy on the assets of a delinquent taxpayer. We also acknowledge that third parties with an interest in assets owned by delinquent taxpayers should be able to sue the IRS if it wrongfully imposes a levy on those assets. Nevertheless, in situations where the IRS imposes a levy on the assets of a delinquent taxpayer, only to discover that another party has a superior claim to the assets, the IRS will be forced to seek other assets to satisfy the tax liability in question. Were we to hold that section 6532(c) can be equitably tolled, we would delay the final disposition of competing claims in cases like this one and would jeopardize, perhaps even destroy, the IRS's ability to impose a levy on other assets owned by a delinquent taxpayer. Such an outcome is not only at odds with purpose behind 26 U.S.C. § 7426, but also the thrust of the Supreme Court's holding in *Brockamp*. *See Brockamp*, 519 U.S. at 352.[16]

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16. Like the time limitation at issue in *Irwin*, but unlike the time limitation at issue in *Brockamp*, section 6532(c) uses "fairly

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D. Other Courts' Analysis of Equitable Tolling and Section 6532

Although the issue of whether the time limitation in section 6532(c) is a statute of limitations, which can be equitably tolled, or a jurisdictional bar, which cannot be equitably tolled, is one of first impression in our circuit, four of our sister circuits have addressed this issue since the Supreme Court's holding in *Irwin*, with three of these circuits concluding that the time limitation set forth in section 6532(c) is a jurisdictional bar.[17] The Second, Seventh, and Eighth

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simple language," rather than "highly detailed," "technical" language. *Brockamp*, 519 U.S. at 350. Viewed in isolation, this fact suggests that like the time limitation at issue in *Irwin*, section 6532(c) can be equitably tolled. However, when the "fairly simple language" of section 6532(c) is considered in the context of the other facts discussed above, all of which indicate that Congress did not intend for section 6532(c) to be equitably tolled, it seems fairly clear that section 6532(c) cannot be equitably tolled. A holding to the contrary would be tantamount to concluding that if Congress were not to "set forth [ ] time limitations in a highly detailed technical matter," *id.*, all time limitations applicable to lawsuits against the government, which are, as a matter of law, "condition[s] to the waiver of sovereign immunity," could be equitably tolled. *Irwin*, 498 U.S. at 94. Such a conclusion is untenable and is at odds with the *Irwin* Court's acknowledgment that statutes that are "a condition to the waiver of sovereign immunity must be strictly construed." *Id.*; *see also, e.g.*, *Lane v. Pena*, 518 U.S. 187, 192 (1996) ("[A] waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign.").

17. Ninth Circuit opinions on this issue are inconsistent. *Compare Maraziti v. Thorpe*, 52 F.3d 252, 255 (9th Cir. 1995) (Cont'd)

Circuits have each concluded that section 7426(a)(1) is the exclusive remedy available to third parties asserting claims to property levied by the IRS *and* that the failure to file a timely claim as required by section 6532(c) deprives a federal district court of subject matter jurisdiction. *See Miller v. Tony & Susan Alamo Found.*, 134 F.3d 910, 916 (8th Cir. 1998) ("The Millers do not dispute they failed to assert a timely § 7426(a)(1) wrongful levy claim on the Fort Smith/Nashville property, [and t]hus, the Millers' claim to the Fort Smith/Nashville property is outside the subject-matter jurisdiction of the district court."); *Amwest Sur. Ins. Co. v. United States*, 28 F.3d 690, 691 (7th Cir. 1994) (affirming the district court's dismissal of a wrongful levy action, untimely under section 6532(c), for lack of subject matter jurisdiction); *Williams v. United States*, 947 F.2d 37, 40 (2d Cir. 1991) (same). Several district courts have also held that section 6532(c) acts not as a statute of limitations but as a jurisdictional bar. *See Compagnoni v. United States*, No. 94-0813-CIV-MARCUS, 1997 WL 416482, at *3 (S.D. Fla. May 13, 1997) (denying a motion for reconsideration of the district court's earlier order dismissing a wrongful levy claim, untimely under section 6532(c), for lack of subject matter jurisdiction), *aff'd. on other grounds*, 173 F.3d 1369 (11th Cir. 1999);

(Cont'd)
(Hawkins, J.) (affirming the District Court's dismissal of a section 7426(a)(1) claim, untimely under section 6532(c), for lack of subject matter jurisdiction) *with Supermail Cargo, Inc. v. United States*, 68 F.3d 1204 1206 n.2 (9th Cir. 1995) (Reinhardt, J.) ("The district court erroneously believed the statute of limitations contained in §26 U.S.C. 6532(c)(1) to be a jurisdictional prerequisite and, accordingly, dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction.").

Fanning v. United States, No. 1:95-CV-222-RCF, 1996 WL 343462, at *2 (N.D. Ga. Apr. 30, 1996) ("As the government points out, the statute of limitations set forth in I.R.C. § 6532(c) 'acts not only as an affirmative defense, but also as a restriction of the district court's subject matter jurisdiction over an action that is untimely filed.' ") (citations omitted), *aff'd. mem.*, 117 F.3d 1432 (11th Cir. 1997); *Hanna Coal Co., Inc. v. Internal Revenue Service*, No. CIV.A. 92-0071-B, 1994 WL 666928, at *1 (W.D. Va. Oct. 12, 1994) ("Therefore, if the statute of limitations espoused in 26 U.S.C. § 6532(c) has expired, then the United States' limited consent to be sued has also expired and this Court would not have proper subject matter jurisdiction over this matter."), *vacated on other grounds*, 1994 WL 762188, at *1 (W.D. Va. Nov. 18, 1994). *But cf. Gothenburg State Bank & Trust Co. v. United States*, No. 7:98CV5026, 1999 WL 314928, at *2 (D. Neb. Apr. 9, 1999) (stating without explanation that "failure to file a timely wrongful levy claim deprives the court of subject matter jurisdiction" but holding that section 6532(c) can be equitably tolled). Thus, the vast majority of federal courts to address squarely this issue have concluded that the time limitation in section 6532(c) is a jurisdictional bar that cannot be tolled, regardless of the equities in a given case, and that the failure to file a claim under section 7426(a)(1) prior to the expiration of the time limitation in section 6532(c) deprives the district court of subject matter jurisdiction.

Reinforcing the conclusion that a district court lacks subject matter jurisdiction to entertain a wrongful levy action that is untimely under section 6532(c) are decisions in four sister circuits holding that the failure to file a timely claim

as required by section 6532(a)[18] deprives a federal court of subject matter jurisdiction. *See RHI Holdings, Inc. v. United States*, 142 F.3d 1459, 1461-63 (Fed. Cir. 1998) (holding that a taxpayer's failure to file a timely claim pursuant to section 6532(a) deprives the court of subject matter jurisdiction); *Marcinkowsky v. United States*, 206 F.3d 1419, 1421-22 (Fed. Cir. 2000) (same); *Bartley v. United States*, 123 F.3d 466, 471-72 (7th Cir. 1997) (stating that unless the taxpayer files a timely claim under section 6532(a), "a court lacks subject matter jurisdiction over a suit for refund"); *Miller v. United States*, No. 96-2787, 1997 WL 381958, at *1-*2 (4th Cir. July 11, 1997) (unpublished opinion) ("Miller appeals from the district court's order dismissing his tax refund suit for lack of subject matter jurisdiction because he failed to file his suit within the two-year statute of limitations provided by I.R.C. § 6532(a)[; w]e affirm."); *Oatman v. Department of Treasury-Internal Revenue Service*, 34 F.3d 787, 789 (9th Cir. 1994) ("The district court lacks jurisdiction over claims for refunds pressed by any potential class members who have not satisfied the procedural requirements of 26 U.S.C. §§ 6532 and 7422."). While 26 U.S.C. § 6532(c) is less detailed and less complex than 26 U.S.C. § 6532(a),[19]

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18. Section 6532(a) governs claims "under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum." 26 U.S.C. § 6532(a) (1996).

19. Section 6523(a) states:

> (a) Suits by taxpayers for refund. —
>
> (1) General rule. — No suit or proceeding under section 7422(a) for the recovery of any

(Cont'd)

Appendix A

(Cont'd)

internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.

(2) Extension of time. — The 2-year period prescribed in paragraph (1) shall be extended for such period as may be agreed upon in writing between the taxpayer and the Secretary.

(3) Waiver of notice of disallowance. — If any person files a written waiver of the requirement that he be mailed a notice of disallowance, the 2-year period prescribed in paragraph (1) shall begin on the date such waiver is filed.

(4) Reconsideration after mailing of notice. — Any consideration, reconsideration, or action by the Secretary with respect to such claim following the mailing of a notice by certified mail or registered mail of disallowance shall not operate to extend the period within which suit may be begun.

(5) Cross reference. — For substitution of 120-day period for the 6-month period

(Cont'd)

in all other relevant respects, 26 U.S.C. § 6532(c) is more like 26 U.S.C. § 6532(a) than 42 U.S.C. § 2000e-16(c). Like section 6532(a), section 6532(c) applies only to suits brought against the government, sets forth its time limitations in unusually emphatic form, sets forth explicit exceptions to its basic time limitations (exceptions which do not include equitable tolling), and is a provision of the Internal Revenue Code set forth in Title 26, Subtitle F, Chapter 66, section 6532, entitled "Periods of limitations on suits." Moreover, like section 6532(a), were section 6532(c) equitably tolled, the IRS could be forced to litigate countless, stale claims, thus creating "serious administrative problems." These similarities suggest that like the time limitation set forth in section 6532(a), the time limitation set forth in section 6532(c) cannot be equitably tolled.

For the foregoing reasons, we conclude that a careful reading of *Irwin* and *Brockamp* leads ineluctably to the conclusion that Congress did not intend for the time limitation in section 6532(c) to be equitably tolled. Consistent with opinions in our sister circuits, we hold that the failure to file a timely wrongful levy claim prior to the expiration of the time limitation in section 6532(c) deprives the district court of subject matter jurisdiction. *Cf. Irwin*, 498 U.S. at 91 ("We granted certiorari to determine when the 30-day period under § 2000e-16(c) begins to run and to

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(Cont'd)

> contained in paragraph (1) in a title 11 case, see section 505(a)(2) of title 11 of the United States Code.

26 U.S.C. § 6532(a) (1986).

resolve the Circuit conflict over whether late-filed claims are jurisdictionally barred."); *Perez v. United States*, 167 F.3d 913, 915-18 (5th Cir. 1999) (noting that the *Brockamp* Court concluded that section 6511 was a jurisdictional time limitation that could not be equitably tolled); *RHI Holdings, Inc. v. United States*, 142 F.3d 1459, 1461-63 (Fed. Cir. 1998) (holding that like the time limitation in *Brockamp*, a taxpayer's failure to file an timely claim pursuant to section 6532(a) deprives the court of subject matter jurisdiction); *Calderon v. United States District Court for the Central District of California*, 128 F.3d 1283, 1288 n.4 (9th Cir. 1997) ("In [*United States v.] Brockamp*, the [Supreme] Court held that a time-limit on filing tax refund claims was a jurisdictional bar, not a tollable statute of limitations.").

IV. CONCLUSION

Because BDC's claim, brought pursuant to section 7426(a)(1), was filed after the time limitation set forth in section 6532(c) had expired, and because the time limitation set forth in section 6532(c) is a jurisdictional bar, which cannot be equitably tolled, we will remand the case to the District Court with instructions to dismiss the case for lack of subject matter jurisdiction.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-6015

BECTON DICKINSON AND COMPANY,

Appellant

v.

REINHARD A. WOLCKENHAUER, a/k/a REINHARD WOLKENHAUER; WALTER WOLCKENHAUER; ROYAL MACHINE AND TOOL COMPANY; WILLIAM HOSIE; ANN HOSIE, d/b/a HANOVER PATTERN; UNITED STATES OF AMERICA, DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 95-cv-01084)
District Judge: Honorable Nicholas H. Politan

Present: Roth, Barry, and Stapleton, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on March 2, 2000.

Appendix A

On consideration whereof, it is now here ordered and adjudged by this Court that the cause is remanded to the District Court with instructions to dismiss the case for lack of subject matter jurisdiction. Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Marcia M. Waldron
Acting Clerk

Dated: June 6, 2000

APPENDIX B — LETTER OPINION AND FINAL ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED AND FILED OCTOBER 28, 1998

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
NICHOLAS H. POLITAN
JUDGE

MARTIN LUTHER KING JR.
FEDERAL BUILDING
& U.S. COURTHOUSE
50 WALNUT ST.,
ROOM 5076
P.O. BOX 999
NEWARK, N.J. 07101-0999

October 28, 1998

LETTER OPINION

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Appendix B

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Reinhard Wolckenhauer and
Walter Wolckenhauer

Re: Becton Dickinson and Company, etc.
v. Reinhard A. Wolckenhauer, etc., et al
Civil Action No. 95-1084 (NHP)

Dear Counsel:

This matter comes before the Court on cross-motions for summary judgment on Count Eleven of Becton Dickinson & Company's Amended Complaint, which asserts, in substance, a wrongful levy action against the United States pursuant to 26 U.S.C. § 7426. The Court has decided the motions without oral argument, pursuant to Federal Rule of Civil Procedure 78. For the reasons explained below, plaintiff's motion for summary judgment is **DENIED**, the Government's cross-motion is **GRANTED**, Counts Eleven and Twelve are **DISMISSED WITH PREJUDICE.**[1]

FACTUAL BACKGROUND

While employed at the Ivers-Lee division of plaintiff Becton Dickinson & Company, defendant Reinhard A.

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1. By letter-brief dated August 13, 1998, plaintiff Becton Dickinson consented to the dismissal of Count Twelve.

Wolckenhauer defrauded his employer through an elaborate scheme involving false and fraudulent purchasing invoices. On or about April 21, 1995, defendant United States of America, Department of the Treasury, Internal Revenue Service ("IRS"), which had been investigating Wolckenhauer's criminal activities, issued a Notice of Levy to the Ivers-Lee Division, alleging that Wolckenhauer owed $865,240.06 in unpaid federal income taxes for the tax years 1988-91 and directing Becton Dickinson to pay to the IRS those sums that Becton Dickinson was obligated to pay Wolckenhauer. In accordance with the Notice of Levy, plaintiff Becton Dickinson remitted the sum of $323,948.44, which represented Wolckenhauer's entitlement under the Becton Dickinson Retirement Plan. The IRS received this payment on or about May 2, 1995.

On March 22, 1996, nearly a year after Becton Dickinson remitted the retirement funds to the Government, Wolckenhauer pleaded guilty to multiple criminal counts alleging conspiracy, mail fraud, and the filing of false income tax returns. *See United States v. Wolckenhauer*, Criminal No. 95-92 (D.N.J.) (Ackerman). The plea agreement stipulated that the amount of loss to Wolckenhauer's victims was more than $1,500,000.00 but no more than $2,500,000.00. On July 15, 1998, Judge Ackerman ordered Wolckenhauer to pay restitution to Becton Dickinson in the amount of $407,148.44.[2]

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2. A previous restitution order, entered September 24, 1996, had awarded Becton Dickinson $2,201,241.00 in restitution. The Court of Appeals vacated that order and remanded the case back to the district court to further develop the record concerning the defendant's assets and the needs of his dependent family members. *See United States v. Wolckenhauer*, No. 96-5640 (3d Cir. 1997).

Appendix B

Plaintiff Becton Dickinson brings this wrongful levy action, pursuant to 26 U.S.C. § 7426, to recover the levied retirement funds in satisfaction of the restitution order. There is no dispute that this action was asserted outside the statute of limitations. The primary question raised in the instant motions is whether the limitations period can be equitably tolled.

DISCUSSION

I. Summary Judgment

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment may only be granted if, drawing all inferences in favor of the nonmoving party, there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *See Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3d Cir.), *cert. dismissed*, 483 U.S. 1052 (1987). Summary judgment may be granted against a party who fails to adduce facts sufficient to establish the existence of any element essential to that party's case, for which that party will bear the burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The moving party bears the initial burden of identifying evidence that demonstrates the absence of a genuine issue of material fact. *Id.* Once that burden has been met, the nonmoving party must set forth "specific facts showing that there is a genuine issue for trial," or the factual record will be taken as presented by the moving party and judgment will be entered as a matter of law. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

The nonmovant must "do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* at 586. Speculation, conclusory allegations, and mere denials are insufficient to raise genuine issues of material fact. To defeat "a properly supported summary judgment motion, the party opposing it must present sufficient evidence for a reasonable jury to find in its favor." *Groman v. Township of Manalapan*, 47 F.3d 628, 633 (3d Cir. 1995).

II. Equitable Tolling Under 26 U.S.C. § 6532(c)

The wrongful levy statute, 26 U.S.C. § 7426, is governed by the statute of limitations set forth in 26 U.S.C. § 6532(c). Because section 7426 represents a grant of jurisdiction and a waiver of sovereign immunity, its statute of limitations must be strictly construed in favor of the United States. *See Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986). It may be subject to equitable tolling only if there is an implied equitable tolling exception in the statute of limitations. *See Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 93-94 (1990).

In *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), the Supreme Court considered whether the statute of limitations applicable to Title VII employment discrimination suits could be equitably tolled against the United States. The statute of limitations at issue in *Irwin*, 42 U.S.C. § 2000e-16(c), provided in relevant part:

> Within thirty days of receipt of notice of final action taken by . . . the [EEOC] . . . an employee or applicant for employment, if aggrieved by the

> final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title. . . .[3]

The Court concluded that "making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver [of sovereign immunity]. Such a principle is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation." *Irwin*, 498 U.S. at 95.

In this case, the United States contends that the availability of equitable tolling has been foreclosed — notwithstanding *Irwin* — by the Supreme Court's more recent decision in *United States v. Brockamp*, 519 U.S. 347 117 S.Ct. 849 (1997), where the Court held that the statute of limitations period applicable to tax refund claims, 26 U.S.C. § 6511, is not subject to equitable tolling.

The *Brockamp* Court distinguished *Irwin* on two grounds. First, unlike the statute at issue in *Irwin*, section "6511 uses language that is not simple. It sets forth its limitations in a highly detailed technical manner, that linguistically speaking, cannot easily be read as containing implicit exceptions. Moreover, § 6511 reiterates its

---

3. A 1991 amendment to section 2000e-16(c) increased the time within which an aggrieved employee or applicant may file a civil action from "within 30 days of receipt of final action" to "within 90 days" of receipt of such notice.

limitations several times in several different ways."[4] *Brockamp*, 117 S.Ct. at 851. In addition, section 6511 sets forth explicit exceptions to its basic time limits, and "those very specific exceptions do not include 'equitable tolling.' " *Id.* at 852. The *Brockamp* Court reasoned that:

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4. Section 6511 says, first, that a

> [c]laim for . . . refund . . . of any tax . . . shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed . . . within 2 years from the time the tax was paid. 26 U.S.C. § 6511(a).

It then says that

> [n]o credit or refund shall be allowed or made after the expiration of the period of limitation prescribed . . . unless a claim for . . . refund is filed . . . within such period. § 6511(b)(1).

It reiterates the point by imposing substantive limitations:

> If the claim was filed by the taxpayer during the 3-year period . . . the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return . . . . § 6511(b)(2)(A).

And,

> [i]f the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim. § 6511(b)(2)(B).

> [t]o read an "equitable tolling" provision into these provisions, one would have to assume an implied exception for tolling virtually every time a number appears. To do so would work a kind of linguistic havoc. . . . Section 6511's detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions, taken together indicate to us that Congress did not intend courts to read other unmentioned, open-ended, "equitable" exceptions into the statute that it wrote. There are no counter-indications. Tax law, after all, is not normally characterized by case-specific exceptions reflecting individualized equities.

117 S.Ct. at 852.

The *Brockamp* Court also found that the volume of returns handled by the IRS each year — 200 million tax returns and more than 90 million refunds — is further suggestive of a congressional intent to preclude equitable tolling and "underscores the linguistic point." *Id.* To read an equitable tolling exception into section 6511, the Court reasoned, "could create serious administrative problems by forcing the IRS to respond to, and perhaps litigate, large numbers of late claims, accompanied by requests for 'equitable tolling' which, upon close inspection, might turn out to lack sufficient equitable justification." 117 S.Ct. at 852.

Defendant United States contends that the *Brockamp* decision forecloses the possibility of equitable tolling under the statute of limitations at issue in this case, section 6532(c).

Appendix B

Only one district court has considered the issue. *See Compagnoni v. United States*, 1997 WL 416482 (S.D. Fla. 1997) (unpublished) (stating that *Brockamp* precludes equitable tolling under section 6532(c)); *but see Capital Tracing, Inc. v. United States*, 63 F.3d 859, 860 (9th Cir. 1995) (holding that § 6532(c) can be equitably tolled). In *Compagnoni*, the court reasoned that "the considerations brought to bear in *Brockamp* may dictate the result here. Among other things, section 6532 . . . , like section 6511(a), contains 'highly detailed technical [language], that linguistically speaking, cannot easily be read as containing implicit exceptions.' " 1997 WL 416482, *3 (quoting *Brockamp*, 117 S.Ct. at 851).

This Court is not persuaded by *Compagnoni*. Section 6532(c) contains none of the three elements that were determinative in *Brockamp*: 1) detailed and technical language, 2) substantive limitations on the amount of recovery, and 3) the risk of over-burdening the IRS. Turning first to the linguistic component, section 6532(c) provides:

> **(c) Suits by persons other than taxpayers. —**
>
> **(1) General rule.** — Except as provided by paragraph (2), no suit or proceeding under section 7426 shall be begun after the expiration of 9 months from the date of the levy or agreement giving rise to such action.
>
> **(2) Period when claim is filed.** — If a request is made for the return of property described in section 6343(b), the 9-month period prescribed

> in paragraph (1) shall be extended for a period of 12 months from the date of filing of such request or for a period of 6 months from the date of mailing by registered or certified mail by the Secretary to the person making such request of a notice of disallowance of the part of the request to which the action relates, whichever is shorter.

This statute is simple in language and construction, like the provision at issue in *Irwin*. It merely states that suits under section 7426 "shall [not] be begun after 9 months from the date of the levy." Section 6532(c) does not repeat the limitations period multiple times and it does not contain substantive limitations on the amount of recovery.

Moreover, the *Brockamp* Court emphasized that § 6511's limitations period could not be tolled because the "nature and potential magnitude of the administrative problem suggest that Congress decided to pay the price of occasional unfairness in individual cases." 117 S.Ct. at 852. Unlike sections 6511 and 6532(a),[5] which apply to claims made by

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5. The text of section 6511 is set forth *supra* in footnote 3. Section 6532(a), which applies to civil suits by taxpayers for refund pursuant to 26 U.S.C. § 7422, provides:

> § 6532. Periods of limitation on suits
>
> **(a) Suits by taxpayers for refund. —**
>
> **(1) General rule.** — No suit or proceeding under section 7422(a) for the recovery of any internal revenue

(Cont'd)

Appendix B

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tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.

(2) Extension of time. — The 2-year period prescribed in paragraph (1) shall be extended for such period as may be agreed upon in writing between the taxpayer and the Secretary.

(3) Waiver of notice of disallowance. — If any person files a written waiver of the requirement that he be mailed a notice of disallowance, the 2-year period prescribed in paragraph (1) shall begin on the date such waiver is filed.

(4) Reconsideration after mailing of notice. — Any consideration, reconsideration, or action by the Secretary with respect to such claim following the mailing of a notice by certified mail or registered mail of disallowance shall not operate to extend the period within which suit may be begun.

(5) Cross reference. — For substitution of 120-day period for the 6-month period contained in paragraph (1) in a title 11 case, see section 505(a)(2) of title 11 of the United States Code.

This Court agrees with the several courts that have held that *Brockamp* precludes equitable tolling under section 6532(a), because

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taxpayers, section 6532(c) applies only to third-party wrongful levy actions and it therefore would not "create serious administrative problems by forcing the IRS to respond to, and perhaps litigate, large numbers of late claims." *Brockamp*, 117 S.Ct. at 852. Although subsection (2) permits a one-year extension upon request, section 6532(c), overall, does not contain the linguistic and substantive complexity that compelled the Supreme Court to preclude equitable tolling under § 6511. *Compare* 26 U.S.C. § 6532(a). In this Court's judgment, section 6532(c) is an ordinary statute of limitations that falls within the general rule of *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990). *See Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1207 (9th Cir. 1995) (holding that *Irwin* permits tolling against Government under § 6532(c)).[6] The Court's subsequent decision in *Brockamp* does not foreclose the possibility of equitable tolling.

(Cont'd)
that provision is linguistically detailed and complex, and also because, as a provision applicable to taxpayer suits, permitting equitable tolling would expose the IRS to unwieldy administrative burdens. *See RHI Holdings, Inc. v. United States*, 142 F.3d 1459 (Fed. Cir. 1998) and *Thomasson v. United States*, 1997 WL 220321 (N.D. Ca. 1997) (unpublished).

6. The Ninth Circuit has not revisited this issue since the Supreme Court decided *Brockamp*, but it has cited *Supermail Cargo* and *Capital Tracing*, 63 F.3d 859 (9th Cir. 1995), with approval in post-*Brockamp* cases. *See, e.g., Wilson v. Marchington*, 127 F.3d 805, 815 n.10 (9th Cir. 1997).

III. Tolling in this Case

A statute of limitations can be extended on equitable grounds upon the plaintiff's showing either that he did not have and could not with due diligence obtain information necessary for bringing suit within the limitations period (equitable tolling), or that he was induced or tricked by his adversary's misconduct into allowing the filling deadline to expire (equitable estoppel).[7] *See Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990). However, although the *Irwin* Court held that equitable tolling is available against the Government, the Court also emphasized that "federal courts have typically extended [such] relief only sparingly, [and they have] generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights" *Id.* at 95-96.

The Third Circuit permits equitable tolling against the Government if "(1) the defendant has actively misled the plaintiff, (2) the plaintiff has in some extraordinary way been prevented from asserting his rights, or (3) the plaintiff has timely asserted his rights mistakenly in the wrong forum." *United States v. Midgley*, 142 F.3d 174, 179 (3d Cir. 1998) (citations omitted).

In this case, plaintiff Becton Dickinson contends that it could not have asserted its wrongful levy action within the nine-month limitations period because it did not acquire a property interest in the levied funds until Judge Ackerman

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7. Although the cases do not usually distinguish between equitable estoppel and equitable tolling, see *Wolin v. Smith Barney, Inc.*, 83 F.3d 847, 852 (7th Cir. 1996).

first ordered restitution on September 24, 1996.[8] *See supra* footnote 1. After reviewing the factual record in this matter, however, this Court is not persuaded that the equities favor tolling.

Most significant in this regard is plaintiff's failure to pursue its right to an extension of the limitations period under § 6532(c)(2). If plaintiff had simply notified the IRS of its claim to the funds within § 6532(c)(1)'s nine-month period, such notice may have extended the limitations period by an additional twelve months. *See* 26 U.S.C. § 6532(c)(2). Such an extension would have permitted Becton Dickinson to file its wrongful levy action as late as January 20, 1997 — nearly four months after Judge Ackerman's September 24, 1996 restitution order.[9]

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8. It is worth noting that the facts plaintiff relies upon for purposes of equitable tolling may, on closer inspection, preclude relief on the merits. That is, plaintiff concedes that it did not have any property interest that could confer standing to sue under § 7426 until Judge Ackerman issued the restitution order on September 24, 1996. It seems unlikely, therefore, that plaintiff could establish that it has a property interest in the retirement funds that is superior to the Government's interest. *See Texas Commerce Bank-Fort Worth v. United States*, 896 F.2d 152, 161 (5th Cir. 1990) (holding that the "basic priority rule of 'first in time, first in right' controls" wrongful levy actions under § 7426); *see also United States v. City of New Britain*, 347 U.S. 81, 85-86 (1954).

9. Section 6532 does not explain which date is the "date of levy," but the regulations promulgated pursuant to that section refer to 26 U.S.C. § 6502(b), which provides: "the date on which a levy on property or rights to property is made shall be the date on which the notice of seizure . . . is given." *See also Miller v. United States*, 838 F. Supp. 338, 339 (N.D. Ohio 1993).

In sum, this Court finds that plaintiff failed to actively and diligently pursue its judicial and statutory remedies. Equitable principles do not mitigate in favor of tolling the statute of limitations in this case.

IV. Elements of Wrongful Levy Action Pursuant to § 7426

Although this Court need not reach the merits of plaintiff's wrongful levy action, a brief review of the statutory requirements reveals that plaintiff could not prevail, even if the limitations period were tolled.

Section 7426 creates a cause of action for innocent parties whose property has been wrongfully confiscated by the IRS to satisfy another person's tax liability.[10] In order to state a claim under this provision, the plaintiff must show: (1) that a levy has been filed against property in the plaintiff's possession, (2) that plaintiff has an interest in or a lien on the property which is senior to the interest of the United States, and (3) that the levy was wrongful. *See Texas Commerce Bank-Fort Worth v. United States*, 896 F.2d 152, 156 (5th Cir. 1990). Even a cursory review of the record shows that Becton Dickinson cannot establish the second and third elements.

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10. Section 7426(a) provides:

> If a levy is made on property . . . , any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States . . . .

First, the restitution order did not confer a property interest upon Becton Dickinson within the meaning of § 7426, because it did not grant "specific, possessory rights" in the levied retirement funds.[11] *See Valley Finance, Inc. v. United States*, 629 F.2d 162, 168 (D.C. Cir. 1980) (noting that § 7426 was intended to "improve[ ] the status of private secured creditors" and holding that the "statutory language, by effectively equating the terms 'interest' and 'lien' and relating both to 'property,' indicates that only persons claiming specific, possessory rights are entitled to seek judicial review").[12] The restitution award granted plaintiff a right to receive money, but it did not grant any property rights in the levied pension funds.

Moreover, even assuming that the September 24, 1996 restitution order created in plaintiff a property interest within the meaning of § 7426, such an interest would clearly be junior to the Government's interest, which was secured pursuant to an April 21, 1995 Notice of Levy. *See Texas Commerce Bank-Fort Worth v. United States*, 896 F.2d 152, 161 (5th Cir. 1990) (holding that the "basic priority rule of

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11. Plaintiff concedes that "Becton Dickinson did not obtain enforceable property rights to the pension until September 24, 1996, when restitution was ordered." Memorandum of Law in Support of Becton Dickinson's Motion for Summary Judgment on the Eleventh Count of the Amended Complaint Against the Internal Revenue Service, at 10 n.6 (filed May 22, 1997); *see supra* footnote 8.

12. Indeed, several courts have held that a plaintiff without a specific property right in the levied assets lacks standing to sue under § 7426. *See, e.g., Valley Finance*, 629 F.2d at 168, *Aspinall v. United States*, 984 F.2d 355, 357-58 (10th Cir. 1993).

'first in time, first in right' controls" wrongful levy actions under § 7426); *see also United States v. City of New Britain*, 347 U.S. 81, 85-86 (1954).

Plaintiff also fails to satisfy the third element of a wrongful levy action — that the Government's levy be wrongful. "A levy is wrongful [under § 7426] if it seizes property that does not belong, in whole or in part, to the taxpayer." *Texas Commerce*, 896 F.2d at 156; *see also United States v. National Bank of Commerce*, 472 U.S. 713, 731 n.14 (1985) (stating that "the legislative history makes clear that 'wrongful' as it is used in § 7426(a) refers not to intentional wrongdoing on the Government's part, but rather refers to a proceeding against property which is not the taxpayer's") (citations omitted). In this case, there is really no question that, at the time of the Government's levy, the target pension funds belonged to the person against whom the tax was assessed. That is, the funds belonged to Wolckenhauer, not Becton Dickinson.

This Court therefore concludes that, even if tolling the statute of limitations were justified in this case, plaintiff Becton Dickinson could not prevail in its wrongful levy action against the Government. Summary judgment dismissing Count Eleven is therefore warranted.

Appendix B

CONCLUSION

For the reasons explained above, plaintiff's motion for summary judgment is **DENIED** and the Government's cross-motion for summary judgment **GRANTED.** As this Letter Opinion disposes of all remaining claims and issues, this case is closed.

s/ Nicholas H. Politan
NICHOLAS H. POLITAN
U.S.D.J.

Appendix B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 95-1084
HON. NICHOLAS H. POLITAN

BECTON DICKINSON and COMPANY, etc.,

Plaintiff,

v.

REINHARD A. WOLCKENHAUER, a/k/a REINHARD WOLCKENHAUER MACHINE AND TOOL COMPANY, etc., et al.,

Defendants.

FINAL ORDER

THIS MATTER having come before the Court on cross-motions for summary judgment; and the Court having considered the parties' submissions and decided the matter without oral argument; and for the reasons explained more fully in the Court's Letter Opinion in the above-captioned matter; and for good cause shown;

IT IS on this 28th day of October, 1998,

ORDERED that plaintiff's motion for summary judgment be and hereby is **DENIED;** and it is further

Appendix B

ORDERED that defendant United States' motion for summary judgment is **GRANTED;** and it is further

ORDERED that this **CASE IS CLOSED.**

s/ Nicholas H. Politan
NICHOLAS H. POLITAN
U.S.D.J.